U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 March 2003

CASE NOS.: 2002-WPC-3; 2002-WPC-4; 2002-WPC-5; 2002-WPC-6; 2003-WPC-1

In the Matter of

DONNA L. TRUEBLOOD,
Complainant,

v.

VON ROLL AMERICA, INC., D.B.A. WTI OR WASTE TECHNOLOGY, INC**.** AND HERITAGE ENVIRONMENTAL SERVICES, INC.
Respondents

Appearances:

Richard R. Renner, Esq.,
For the Complainant

Donald R. Keller, Esq.
For Von Roll America, Inc.

Jason J. Stout, Esq.,
For Heritage Environmental Services, Inc.

RECOMMENDED DECISION AND ORDER GRANTING RELIEF

Background[1]

This is a proceeding arises under the employee protection provisions of the:

1. Energy Reorganization Act ("ERA"), 42 U.S.C. 5851;
2. Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971(a) *et seq.*, also known as the Resource Conservation and Recovery Act ("RCRA");
3. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610, ("CERCLA");
4. Safe Drinking Water Act, 42 U.S.C. §300j-9[i] ("SDWA");
5. Toxic Substances Control Act, 15 U.S.C. §2622, ("TSCA");
6. Water Pollution Control Act, 33 U.S.C. §1367, ("WPCA"); and,
7. The additional statutes and implementing regulations at 29 C.F.R. Parts 18 and 24.

[1] Complainant's exhibits are marked ("CX,"); Administrative Law Judge Exhibits ("ALJ"); Respondent VRA's exhibits "VRAX" Respondent Heritage ("HESX"); Joint exhibits "JX"; depositions ("Dep."); and, the transcript testimony "TR." Each reference to a TR page number or deposition will refer to the witness whose testimony is being discussed, unless otherwise indicated.

Such provisions protect employees from discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part, and specifically for preventing employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of these statutes.

Ms. Trueblood complained that the respondents had unlawfully disciplined her, discriminated against her, or, in the case of HES, failed to hire her.

Complainant, Donna L. Trueblood, timely filed whistleblower complaints against the Respondents: on April 9, 2002 (OSHA #5-1680-02-059)(OSHA #5-1680-02-060); June 5, 2002 (OSHA #5-1680-02-081); July 17, 2002 (OSHA # 5-1680-02-106); and, October 25, 2002 (OSHA #5-1680-03-018) alleging violations of WPCA, SDWA, TSCA, SWDA, CAA, and ERA of 1974.

Substance of Complaints

In her first combined complaints, Donna L. Trueblood, alleged that: (1) on or about March 11, 2002, VRA subjected her to a hostile work environment and hostile interrogations; (2) on or about March 11, 2002, VRA subjected her to a constructive temporary layoff; (3) VRA restrained her and other employees from engaging in protected activities; (4) VRA and HES prohibited her from applying for promotions and transfers, or retaliated against her for protected activity by not permitting her to interview for a customer service representative ("CSR") position with HES.

In her second complaint, Donna L. Trueblood, alleged that VRA retaliated against her because of protected activity by: (1) prohibiting her from working overtime; (2) failing to notify her of training opportunities while she was on leave; (3) subjecting her to close supervision; (4) notifying her that she would be recommended for a "minor offense" for excessive absenteeism and docking her pay on May 17, 2002; (5) failing to offer her early release during a work lull, on or about May 22, 2002; (6) issuing a "major offense" on May 31, 2002; and, (7) on June 3, 2002, suspending her for a week without pay and good cause.

Ms. Trueblood's third complaint alleges VRA retaliated against her because of her protected activity by: (1) giving notice, on June 24, 2002, of its intent to eliminate its short-term disability program; and, (2) on July 11, 2002, requiring her to provide a releases from Gateway drug rehabilitation program.

Her fourth complaint alleged that VRA retaliated against her because of her protected activity by discharging her on October 25, 2002.

The Regional Administrator for the Occupational Safety and Health Administration, Cleveland, Ohio, (hereinafter "OSHA") made various findings on: May 23, 2002 (finding violation as alleged in April 9, 2002, complaints); June 7, 2002 (finding no violation based on June 7, 2002, complaint); August 6, 2002 (finding no violation based on June 5, 2002, complaint); September 5, 2002 (finding no discrimination); and, November 7, 2002 (referring October 25, 2002, discharge complaint to ALJ).

Relief Sought

The Complainant and Respondents objected to OSHA's findings and, on June 10, 2002; June 24, 2002; August 6, 2002; September 16, 2002, filed requests for formal hearings. The relief Ms. Trueblood seeks includes:

1. Reinstatement at VRA as a service technician with the drum crew and restoration of all benefits, terms and privileges of employment.

2. Reinstatement of leave time used between March 13 and May 6, 2002, on the deposition dates (August 5, 6, 7, 19, 28, 30, and Sept. 3, 2002) and for the first eight days of the hearing.

3. Back pay, overtime, benefits, reinstatement of seniority and tenure, and other orders necessary to make her whole.

4. Abatement of respondents' unlawful practices and policies.

5. An order expunging Trueblood's disciplinary record and any references thereto.

6. An order prohibiting respondent from disclosing any disparaging information about her to prospective employers or otherwise interfering with any applications she may make.

7. Compensatory damages for emotional distress and loss of reputation.

8. Exemplary damages, under TSCA and SDWA.[2]

9. Payment of reasonable attorney's fees of the complainant.

[2] I ruled punitive damages were available only under the Toxic Substances Act, 15 U.S.C. § 2622(b) and the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(B)(ii). See, 20 C.F.R. § 24.7(C)(1).

10. Interest on back pay and benefits commencing March 11, 2002 and continuing until reinstatement.

11. An order that the respondent take all reasonable affirmative action to abate discrimination which may discourage employees from raising concerns and officially inform employees of their right to contact the EPA and AG.

12. A notice that the DOL has found respondents violated the rights of a whistleblower, Ms. Trueblood, and ordered she be made whole.

13. Prominent posting of the Recommended Decision and Order at all of respondents' facilities.

Procedural History

This matter was referred to the Office of Administrative Law Judges in June 2002. I was assigned the case on June 19, 2002. Notices of Hearing and Pre-Hearing Orders were issued, on June 19, 2002, July 8, 2002, and August 21, 2002, scheduling formal hearings in Canfield, Ohio, which after delays commenced on September 10, 2002. Further hearings were held the weeks of October 7, 2002 and November 18, 2002. All parties were afforded a full opportunity to present testimony, offer documentary evidence, submit oral arguments and post-hearing briefs. The following exhibits were received into evidence: Complainant Exhibit Numbers ("CX") 1-5, 9-10, 12-15, 17-21(A-G), 22-43, 45-51, 54-70, 72-74, 77-78, 80-86, 88-91, 93-97, and 99-100; Respondent VRA Exhibit Numbers ("VRAX") 1, 3-8, 10, 16, 17, 19-30, 35-40, 42-44, 46-47, 53, 55-59, 63, and 65-67; and, HES Exhibit Numbers ("HESX") 1, 4, 8, and 12-14.[3] ALJ I contains the parties' stipulations. ALJ II is a list of acronyms. ALJ III is a letter from the Complainant's counsel to OSHA dated September 3, 2002, regarding the processing of her supplemental complaint of July 17, 2002. ALJ IV is the judge's working draft organizational chart. ALJ V is the agreed upon reconstructed testimony of Mr. Cox a small portion of which had not been accurately recorded. The parties submitted post-hearing briefs on December 31, 2002.

STIPULATIONS

The parties stipulated and agreed that:

1. Heritage Environmental Services/WTI, LLC, owns 51% of VRA.

[3] The Complainant moved for the admission of CX 102 for identification post-hearing. VRA objected. I exclude the proposed exhibit and do not consider it.

2. Respondent Von Roll America, Inc., ("VRA" or "Von Roll") provides incineration of industrial waste at its location at East Liverpool, Ohio. Respondent Heritage Environmental Services, LLC ("HES" or "Heritage") provides a temporary transfer location of industrial waste in East Liverpool, Ohio.

3. Complainant, Donna L. Trueblood, is and has been an employee of VRA, since about January 18, 1999.[4]

4. VRA is subject to Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), commonly known as the Solid Waste Disposal Act ("SWDA"). This stipulation does not prevent the parties from introducing evidence that respondents are also subject to other parts of RCRA or that HES is subject to RCRA.

5. Complainant, Donna L. Trueblood, worked as a service technician and member of VRA's drum crew. Her duties included, but were not limited to, sampling hazardous waste, reviewing hazardous waste manifests, signing the manifests, and handling drums of hazardous waste.

6. Complainant, Donna L. Trueblood, timely filed whistleblower complaints against the Respondents on April 9, 2002 (OSHA #5-1680-02-059)(OSHA #5-1680-02-060), June 5, 2002 (OSHA #5-1680-02-081) within 30 days of alleged violation of WPCA, SDWA, TSCA, SWDA, CAA, and ERA of 1974.

7. The Occupational Safety & Health Administration ("OSHA"), U.S. Department of Labor, issued determinations on May 23, 2002 (5-1680-02-059); June 7, 2002 (5-1680-02-060); August 6, 2002 (5-1680-02-081).

8. VRA and or the complainant timely appealed the OSHA determinations on: June 10, 2002; June 24, 2002; August 14, 2002; and August 15, 2002.

9. The Ohio Environmental Protection Agency ("OEPA") maintains a presence on VRA's East Liverpool site.

10. The Ohio EPA and USEPA had investigated VRA during the week of February 25, 2002.

11. In February, 2002, complainant sent e-mails to the Ohio EPA about alleged compliance issues at VRA.

[4] She was terminated on October 25, 2002.

12. On March 11, 2002, VRA management, Alfred Sigg and Allison Knowles, met with the complainant.

13. Complainant was on an approved short-term disability (STD) leave of absence from March 13, 2002, to May 6, 2002.

14. In February 2002, the complainant had applied for a position at Heritage, as a customer service employee, for which a possible interview was attempted to be scheduled for April 2, 2002 or April 3, 2002. Due to the extension of the complainant's leave, the interview was scheduled for April 8, 2002.

15. On or about the period of April 4 to 8, 2002, Heritage informed the complainant that it would not interview her for a customer service position after complainant's STD was extended to May 6.

16. Complainant has not applied for other positions at Heritage.

17. The position for which the complainant had applied, at Heritage, was never filled. Heritage undertook a hiring freeze.

18. Complainant has not applied for promotions or other advancement with VRA since January 1, 2002. Complainant did apply for the Heritage CSR position.

19. Upon her return from leave, on May 6, 2002, the complainant requested overtime work and on May 7, 2002, was told she could not sign up for overtime work. The overtime work would have involved operating a forklift.

20. The complainant provided VRA information from her doctor, Dr. Sitarik, on May 14, 2002, that she was safely able to perform all her duties provided that the medication she was prescribed by her doctor was taken as prescribed and not mixed with any other drug or alcohol. Upon receipt of the letter, Complainant was permitted to work overtime.

21. VRA has permitted the complainant to make up training missed in March and April 2002, while on short term disability leave.

22. Prior to May 17, 2002, the complainant had requested vacation time by submitting VRA's form for the same.

23. On June 3, 2002, VRA issued a major safety violation to the complainant for alleged unsafe behavior by sticking a utility knife in the button used to operate a conveyor moving drums of hazardous waste. She was suspended without pay for one week.

24. VRA had issued major safety violations to two other, previously undisciplined, employees, on June 12, 2002, and June 19, 2002, for having stuck utility knives in the button used to operate the conveyor for moving drums. Complainant's supervisor has been disciplined for a safety violation.

25. The complainant had been disciplined for a minor safety violation, June 21, 2002, for careless forklift operation.

26. VRA's work rules, under Policy No. 502, provide guidance that a final written warning or suspension without pay may result for a second minor offense. A first major violation may result in a final written warning or suspension without pay.

27. The letters dated March 11,18, 20 and 25, from VRA and attached to complainant's April 9, 2002, complaint are genuine and authentic.

28. Heritage Environmental Services like other entities involved in the hazardous waste business has -- had findings of violation by regulatory agencies, even though they do not necessarily agree with all those violations. . ." (TR 2475).

(ALJ I).

ISSUES

I. Whether jurisdiction exists under the environmental acts, pursuant to which the allegations were made?

II. Whether, under the acts, the respondents disciplined **(**intimidated, threatened, restrained, coerced, blacklisted,) or otherwise in any manner discriminated (i.e., failed to hire) against an employee, to wit the complainant, regarding her compensation, terms, conditions or privileges of employment, because the employee:

A. Engaged in a protected activity or conduct? and,

B. The employer knew the complainant had engaged in the protected activity? (29 C.F.R. § 24.5(2)(ii)).

III. Are the named respondents "employers" as defined in the act?

IV. If the respondents violated the acts, what are appropriate compensatory damages, costs and expenses and what further relief, if any, (i.e., compensation, back pay, terms, conditions and privileges of employment, attorney and expert witness fees, and, exemplary damages) should be ordered?

FACTS

Von Roll America, Inc., ("VRA") operates an industrial waste incineration facility at East Liverpool, Ohio, serving the environmental needs of industry. (TR 424). It receives waste, in a variety of packaging, from over one hundred customers associated with thousands of processes. (CX 50, page A-9). Heritage Environmental Services, LLC ("HES") operates an adjoining facility. Mr. Fred Sigg is VRA's Vice President and the East Liverpool plant general manager. (VRAX 53; TR 418). Mr. John Avdellas, a former VRA employee, is the HES LLC facility or business manager. He had served only eleven months at the time of his testimony.

Von Roll holds a permit, issued by the United States Environmental Protection Agency ("USEPA"), under Subtitle C of the Resource Conservation and Recovery Act ("RCRA"). (ALJ I; Stipulation 4; TR 423). It holds no permits under the Clean Air Act ("CAA"), the Clean Water Act, the Safe Drinking Water Act, or the Toxic Substances Control Act and Energy Reorganization Act. (TR 423-424; TR 980-981). It holds permits under state laws relating to air and water pollution. (TR 423, 980, 1390).

Heritage provides a temporary transfer location for industrial waste, in East Liverpool, Ohio. (ALJ I, Stipulation 2). Its office is located in the Columbiana County Port Authority Building, adjacent to Von Roll's property. (TR 419; CX 6). Neither its offices nor its 10-day temporary transfer facility are located on VRA property. (TR 408-409, 1479).

Under an agreement with the state, two OEPA inspectors, Pat Natali and Michele Tarka are stationed at the VRA facility on a full-time basis and have "free reign". (TR 934, 1100; Zaengerle Dep. 44). VRA contributes about $15,000 per quarter for their services. (TR 485). VRA is said to have an unofficial, unwritten, policy of employee openness with the OEPA. (TR 941). VRA conducts annual "compliance" training. (TR 427).

It is also VRA's unwritten policy or preference that their staff must first report compliance issues to management. (TR 1464-65 Avdellas; TR 944 Cuppett). Mr. Cuppett, the Environmental Department Manager, testified VRA's intent is for the management team to be aware of communications with outside agencies in order to operate the facility in a compliant manner. (TR 944). That gives VRA a chance to correct the problem without third-party or agency intervention. (TR 935). However, Mr. Cox, a former employee, added that at one "incident command meeting" the managers were told to inform their people not to talk to the EPA. (TR 156). Mr. Sigg testified, at his deposition, that VRA "absolutely" has an established policy that employees are to report their health, safety, and environmental concerns first to

management before reporting them to outside agencies.[5] (CX 18 Sigg Dep. P. 205-206). According to Mr. Sigg, it is in the interests of the employees health and safety and permits VRA to fix environmental issues. (Id. At 206). The spirit or intent of the "management-first" reporting policy is said to be met if management learns of a matter from some other source. (Id at 207).

Once management is informed, employees are then free to communicate with outside agencies. (Id at 207). Dr. Rudolph Zaengerle, VRA's President and HES' President, testified that VRA wants to know first if there is an issue of concern in order to react and correct it immediately. (Zaengerle Dep. 43, 45). He did not see the point in having a policy which allowed employees to make reports to an agency irrespective of whether an issue was reported to a manager. (Zaengerle Dep. 43-44).

Ms. Trueblood first worked at VRA, in January 1998, as a contract employee. (TR 1550). She had had previous experience dealing with hazardous waste. (TR 1551). On January 18, 1999, VRA hired her as a full-time service technician assigned to the drum crew. (TR 1550; ALJ I, Stip. 3). Many employees considered her to be a good worker and honest. (TR 146-148, 228, 1496, 2356-2357, 1535, 1947-1948, 1223). Some believed she was very conscientious. (TR 1299-1300). According to Curt Cox, however, she had a pre-hiring reputation for having a "big mouth" and a propensity for raising issues at the facility. (TR 144, 1764). He thus went so far as to recommend that VRA not hire her because he foresaw that her views would conflict with the corporate culture. (TR 144).

As a "drum crew" employee, Ms. Trueblood unloaded waste containers (drums, buckets, lab packs) from trucks, checked drum counts, matched offloaded waste containers to the manifest, sampled containers, and stored waste containers using a forklift.[6] (ALJ I, Stip. 8; TR 1769). The drum crew must move accepted waste containers along a conveyor system toward the appropriate destination for it. Her job involved reading and checking manifests to ensure the manifests accurately described the waste delivered. (TR 1780-1781).

A manifest is an important document because it records the movement of hazardous waste from "cradle to grave," a RCRA requirement. (TR 325, 1081-83, 1769, 2286; CX 43). The manifest contains numerous items and data, including the number of drums on the truckload, the waste type and the waste profile. (TR 1768). Unfortunately, discrepancies on the manifests were a daily occurrence. (TR 146-147, 327). Sometimes the count was simply wrong. (TR 1436, 2286). Other times, the waste was incorrectly identified and labeled. Sometimes the concentrations listed were wrong or the shipping name of the waste was wrong. (TR 2363). Manifest discrepancies potentially raised possibilities of investigation into its source or of incorrect storage of the waste. (TR 328, 2287).

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[5] Interestingly, HES LLC has a nearly identical policy, according to Mr. Avdellas. But, the HES policy lets the supervisor decide whether the employee may take an issue to an outside agency. (TR 1464).

[6] CX 43 is a sample manifest. (TR 1081).

Waste "generators" are required to make accurate reports of what they generate and ship, but occasionally prepare the manifests poorly. (TR 1537). Transporters are required to account for all the waste they receive and deliver. Disposal facilities, as the final resting place, must accurately account to the government the waste they receive, from whom, and how it is disposed. (TR 1485).

Ms. Trueblood would carefully check the manifests for discrepancies and note them on line 19, as required by law. (TR 1552, 1300, 1182-83, 1206-1207). While she had had a good working relationship with her supervisor, Juanita Kuhn, in the early months of her employment, Kuhn reported her relationship with Ms. Trueblood "went downhill" because "I didn't trust what was being said back and forth between us." (TR 1552, 2284). Mr. Cox speculated Ms. Kuhn was intimidated by Ms. Trueblood's knowledge of the law. (TR 187). In March 2002, Ms. Kuhn was reprimanded for disclosing Trueblood's personal information based on the latter's complaint. (1842).

According to Ms. Trueblood, customers did not like discrepancy notations, because they catch the eye of regulators and sometimes required further explanations or accounting of hazardous waste. (TR 1599). She testified her relationship with Ms. Kuhn changed when she (Ms. Trueblood) began complaining about how VRA was checking and completing the manifests. (TR 1552). Instead of identifying the discrepancies on the manifests, "they" would change the face of the manifest itself, e.g., by changing what was listed as a metal drum, and was not, to be listed as a fiber drum. (TR 1552). At some point, Ms. Trueblood claimed management instructed the drum crew to note discrepancies from HES trucks on a separate paper (not on the manifest as required by law). (TR 1539-1544). Mr. Lancaster wrote that VRA had trained the receiving staff not to mark the manifests, but that Ms. Trueblood is the only one who informed management she would not complete the manifests as they had directed.[7] (CX 52A; TR 1300).

Ms. Trueblood was told to contact VRA's customer service office prior to noting any discrepancies. (TR 1551). Most of the time, customer service would tell her to "go-ahead" and note the discrepancies on the manifest. (TR 1551). Customer Service could contact the customer to attempt to resolve the apparent discrepancies. The service technicians, such as Ms.. Trueblood, were expected to sign the manifests on behalf of VRA, thus certifying the waste was received for disposal. Ms. Trueblood brought manifest mistakes she, her co-workers, and supervisor made to management's attention, asking that they be corrected. She felt some of management's directions were illegal. (TR 1661-1663; CX 75). Ms. Trueblood's supervisor rated her as average to below-average with her work on manifests in her performance reports, as well as addressing comments concerning that work.

[7] Lancaster was discharged by VRA on July 27, 2002. (TR 1323-4).

(TR 1771-73, 1782, 1792, 2379; VRAX 3, 4, 8, 10). On April 9, 2001, Ms. Kuhn gave Ms. Trueblood a written warning regarding mistakes on manifests and profiles. (VRAX 5).

In February 2002, Ms. Trueblood sent e-mails to Ms. Natali and received e-mails from her concerning waste storage issues and a joint OEPA-USEPA on-site inspection of the East Liverpool facility. (CX 10, 46; TR 1089, 1820). In fact, she had communicated with the EPAs during most of her employment with VRA. (TR 1118-21,1809, 1820-22; CX 10; CX 25; CX 27, CX 28; CX 47; CX 49; CX 56, CX 65; CX 77; CX 78; CX 80; CX 81; VRAX 35; TR 1843-44; VRAX 16; VRAX 17; VRAX 35). In mid-to-late February 2002, Ms. Trueblood continued to notify the OEPA of violations she perceived VRA made. (CX 10). According to Pat Natali, OEPA, Ms. Trueblood's cooperation was helpful to the OEPA's compliance work. (TR 1116-1120). OEPA conducted an investigation into WTI, in late February - early March 2002. (TR 932). It was apparently prompted by a December 10, 2001 letter from former VRA engineer, Terry Lancaster, containing twelve allegations which were not being investigated by the OEPA.[8] (TR 932, 1324; CX 52A). During the investigation, both the OEPA and the USEPA interviewed Ms. Trueblood. As a result of their investigation, OEPA was able to obtain improvements in (VRA's)WTI's environmental compliance. (TR 1083-84, 1120, 1206, 1301).

In late February, 2002, Mr. Cuppett, VRA's Environmental Manger, heard a rumor on the plant floor from a number of sources that Ms. Trueblood had communicated directly with the OEPA about some compliance problems at the facility, but had not informed management of the problems. (TR 921). This was during the course of the OEPA/USEPA on-site inspection. Mr. Cuppett could not identify his source, but "[I]t was pretty common knowledge throughout the plant." (TR 921). Ed Davis, a BOP Group Manager, heard a similar rumor at the time. (TR 2430). Mr. Cuppett felt it was important to inform the plant manager, Mr. Sigg, and did so on March 1, 2002. (TR 923-924). He told Mr. Sigg that "there was a rumor in the plant that Donna Trueblood was communicating with the agency (OEPA) by phone, e-mail, and verbally during that week of the investigation." (TR 264, 266, 928-929). VRA's interrogatory responses stated that Cuppett informed Sigg of a rumor that Complainant knew of health, safety, and/or environmental violations. . . (VRA Interrogatory Response No. 3, page 6; TR 1052). Mr. Sigg testified that Cuppett "mentioned several" people from whom he had heard the rumor. (TR 266).

The rumor concerned Mr. Sigg because, as he testified, of the possibility that health or safety issues existed at the facility which had not been addressed. (TR 267-268). This was the first time he believed an employee had talked to the EPA without first talking to management. (TR 267-8). Ms. Biscella testified that no employee has been disciplined for going to outside agencies or for not first going to management with compliance problems.[9] (TR 701). Mr. Sigg decided to inquire whether Ms. Trueblood had knowledge of any issues about which VRA should be aware. (TR 436). He testified his purpose was to ascertain the substance of her

[8] According to Lancaster, Ms. Trueblood had provided him with information. (TR1300).

[9] Mr. Lancaster testified that Biscella's honesty "goes with the wind." (TR 1315).

communications with the EPAs, to ascertain its validity and "lay it to rest." (TR 295). (In his statement to the OEPA, prepared a month and one-half later, April 25, 2002, Mr. Sigg revealed there was some rumor of communication to the EPA about the 10-day transfer facility). (CX 33B, page 6). He canvassed (less than 10) managers about what, if anything, Ms. Trueblood might have reported to them. (TR 265). He testified he did not recall their responses. (TR 266). The Friday before the Monday, March 11, 2002, meeting, Mr. Sigg told Ms. Knowles, Trueblood's boss' supervisor, he wanted to discuss "compliance" issues with Ms. Trueblood. (TR 522).

Mr. Sigg consulted with Dr. Rudolph Zaengerle before calling Ms. Trueblood in for a meeting. (Zaengerle Dep. 56). Dr. Zaengerle was informed of the (3/11/02) letter's contents, that Ms. Trueblood "may have conveyed information to the EPA without telling management," and that VRA had a right to obtain any such information from an employee. Id. He basically instructed Mr. Sigg to "defend our right." (Id at 58). According to Zaengerle, the next time he and Mr. Sigg spoke about the matter was when Ms. Trueblood filed the complaint.[10] (Id at 58).

On March 11, 2002, Mr. Sigg had Ms. Trueblood's second-level manager, Ms. Knowles, bring her to his office to meet. Ms. Trueblood was not advised what the substance of the meeting was to be. Nor, during her entire employment, had she ever been summoned to the plant manager's office. (TR 1584-1587). In a short meeting, Mr. Sigg advised her he had information from a reliable source that she had made "health and safety" complaints to the EPA without telling them to management and provided her with a letter. (CX 33B; TR 435, 525, 535, 1834). He testified he did not raise his voice. (TR 1830). When asked who the source was he declined to identify him. He asked what her complaints were and for copies of her e-mails to the OEPA. (CX 2). Ms. Trueblood testified he asked if she had had contacts with the EPA and she responded saying she always cooperated with the EPA. (TR 1585). She was scared and afraid she would lose her job. (TR 1585-6). She said she had not filed any "health or safety" complaints with the OEPA. (TR 1829). Ms. Trueblood admitted Mr. Sigg did not ask about "environmental" complaints or violations. (TR 1830). However, Ms. Knowles testified he "explained to her to seek management with compliance issues, and that he asked her to, basically, bring forth any correspondence with outside agencies." (TR 525). She was also to summarize the context of phone conversations. (TR 525, 572).

In his statement to OSHA, Mr. Sigg stated he asked Ms. Trueblood for copies of communications to the OEPA and, if there were phone conversations, to jot them down, as well as e-mails. (CX 33B; see also TR 525). He testified that he did not expect her to make any response at the meeting. (TR 287). He testified that while he did not use the word "environmental", they discussed "compliance" issues in general terms. (TR 433; 1830). Ms. Trueblood answered, on direct and cross-examination, that she did not feel he was asking about "environmental" complaints or violations. (TR 1590, 1831-2). Mr. Sigg was generally aware communications to outside agencies were protected activities. (TR 261-262).

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[10] She filed her first complaint on April 9, 2002.

Because the March 11, 2002 letter from Mr. Sigg to Ms. Trueblood is so central to this case, it is set forth below:

> The management of Von Roll America, Inc. ("VRA") has recently become aware that you have sent e-mail messages regarding alleged health and safety violations at the VRA facility in East Liverpool, Ohio to an Ohio EPA inspector. We are obviously very disappointed and concerned that you did not first notify VRA management regarding these alleged health and safety violations. The safety and health of VRA employees is of primary concern to VRA. VRA requires that employees immediately notify VRA management of any potential or existing health and or safety violations at the facility so that it may investigate and act accordingly in order to protect the health and safety of all VRA employees.
>
> Therefore, VRA requests that you comply with the following:
>
> > 1. Provide VRA with any and all documents, including all e-mails sent to the Ohio EPA inspector, regarding or referring to any alleged health and safety violations at the VRA facility in East Liverpool, Ohio. The documents should be provided to me or Dave Cuppett, Environmental Department Manager.
> >
> > 2. Report any and all concerns regarding any alleged health and safety violations occurring at the VRA facility in East Liverpool, Ohio **first** to VRA management. We expect that you will notify VRA management of any alleged health and safety violations **immediately** upon becoming aware of the alleged violation.
>
> VRA requires immediate compliance with the above-mentioned requests. Once again, protecting the health and safety of VRA employees is of primary concern to VRA and we expect all of our employees to fully comply with our requirement to immediately notify VRA management of any potential or existing health and or safety violations at the facility.
>
> We appreciate your cooperation. If you have any questions or concerns regarding this letter, please feel free to contact me.

(Emphasis supplied)(CX 1). Mr. Sigg testified that he never considered this a disciplinary meeting or matter. (TR 301-304). However, he testified that "she violated my trust in her. As a company, we operate together, we cooperate, we work as a team together to make sure that we run a compliant operation...." (TR 301).

Although the meeting upset Ms. Trueblood, she completed working her shift, worked her full shift the next day, then took sick leave on March 13, 2002 for acute anxiety.[11] (TR 1833-5). On March 12, 2002, she wrote a letter to Mr. Sigg which he did not receive until about March 18, 2002. (TR 1836-38). She wrote she had no documents or e-mails referring to alleged health and safety violations and that if she could be of further assistance "please feel free to contact me." (TR 1837; CX 12). She also sent a letter to Karen Biscella asking if the 3/11/02 meeting was a "disciplinary" committee and if her job was in jeopardy. (CX 29); TR 1838-9). Ms. Biscella responded it had not been a disciplinary meeting. (CX 3). Her sick leave or short term disability lasted until May 6, 2002, during which time she was fully paid. (TR 1841). Although she did not "go out of the house much' during this period, she was able to bathe, do laundry, wash dishes, and, write letters. (TR 1843). She also remained in contact with the EPA. (TR 1843).

On March 18, 2002, Mr. Sigg sent her a second letter "reiterating my concern regarding your alleged health, safety and environmental compliance violations at" VRA. (VRAX 15; CX 2). He asked her to provide "any and all documents regarding and/or referring to any alleged health, safety and environmental compliance violations at the VRA facility by March 25, 2002." (VRAX 15; CX 2). He also asked for e-mails and notes from any conversations with OEPA inspectors. (VRAX 15; CX 2). He added, "We expect all of our employees to fully comply with our requirement to immediately notify VRA management of any potential or existing health,safety or environmental violations at our facility." (VRAX 15; CX 2). Ms. Trueblood felt that if she did not provide documentation, she would be disciplined. (TR 1845).

Mr. Sigg subsequently left a message on Ms. Trueblood's answering machine, at home, saying he would like to talk to her about the issues in the letter. (TR 1850). Then on March 25, 2002, Mr. Sigg spoke, by telephone, with Ms. Trueblood. (TR 436-37). She told him she did not have any documents that she had communicated to the OEPA. (TR 438, 1850). She told him she had e-mails showing where she had let management know about on-going problems. (TR 1851). He responded then he would have to call his source a liar, and that was it, the matter was closed. (TR 439, 1850). Ms. Trueblood then received a letter from Mr. Sigg, dated March 25, 2002, wherein he reiterated the substance of their call and his earlier request for "all correspondence with outside agencies (in particular the Ohio EPA) regarding perceived compliance issues . . ." (CX 4). He added, in light of her representation that "no such communication took place and that all potential compliance issues you were aware of had been communicated to a management person..." he considered this non-disciplinary matter closed. (CX 4). Ms. Trueblood felt the letter was inaccurate because she had informed Mr. Sigg in their telephone conversation that she

[11] Ed Davis, a VRA supervisor who knew Ms. Trueblood, testified that Trueblood was irritated and/or angry about meeting with Sigg.

had always communicated with the EPA. (TR 1591). Ms. Trueblood continued to communicate with the OEPA thereafter. (TR 1853-1854).

Ms. Natali, OEPA on-site inspector, found VRA's reaction against Ms. Trueblood for the rumor "surprising" and "out-of-the ordinary". (TR 1102).

Ms. Trueblood was treated by Dr. Joseph P. Sitarik for her acute anxiety with stress reaction. (VRAX 36). On March 20, 2002, he observed Ms. Trueblood for whom he had prescribed Xanax, "looks dramatically better... seems much more calm, more collect. She is doing significantly better." He continued her on a lower Xanax dosage. (VRAX 36). On March 29, 2002, Dr. Walker, her treating psychologist, wrote she was being treated for depression and anxiety and could not return to work until April 7, 2002. (VRAX 37). His diagnosis was "major depressive disorder-moderate-single episode; occupational problems." (CX 35). On April 3, 2002, Dr. Sitarik found improvement, but difficulty sleeping and advised her to remain off work an additional month. (VRAX 38). On April 23, 2002, he found her "doing very, very well" with occasional sleeping difficulty. (VRAX 39). He continued her on medication. On May 14, 2002, he found her "doing very well, has no problems, complaints, concerns. She is alert, active, functional. . ." (VRAX 40). He felt she could return to work while continuing medications. (VRAX 40). On May 31, 2002, Dr. Sitarik noted that although she was doing well, she was under stress and having chest pain. (VRAX 41).

In February 2002, Mr. Avdellas, HES, decided to hire a customer service representative ("CSR") for the HES LLC East Liverpool office. (TR 1437). He wanted to fill it quickly in order to have someone trained in anticipation of growing a new market. (TR 1437). He obtained approval, as required, from the HES corporate offices and the Human Resources department ("HR"). He then posted the opening on HES' intranet, at all HES offices, the internet, and the VRA East Liverpool facility. (TR 1438-39). The job posting at VRA was dated February 28, 2002. (CX 54). HES received no applications from HES employees, but did from VRA employees. (TR 1439). He reviewed the interested candidates' applications, including Trueblood's, had his office manager, Patty Vantilburg, contact applicants and set interviews for April 2 and 3. (TR 1443; HESX 1). Later, Ms. Vantilburg testified that she "assumed" the CSR position was not filled due to the lawsuit. (TR 2051).

Mr. Avdellas had worked with Trueblood before and testified he was pleased she had applied. (TR 1439). Vantilburg scheduled the appointments, but informed Avdellas there was a problem coordinating Trueblood's appointment. (TR 1444). Trueblood was on leave and unsure she was permitted to interview. Trueblood was concerned that VRA's short-term disability leave ("STD") policy prohibited job searches while on STD. (TR 1599-1600). Ms. Trueblood had asked her friend Nancy Yanni, Ms. Biscella's assistant, whether interviews were prohibited and the latter told her there was no such proscription. (TR 893). (VRA's policies do not prohibit such interviews, according to Ms. Biscella. (TR 704; VRA Policy No. 407)). So, Avdellas contacted her and made alternative arrangements to meet April 8, 2002, when she returned to work. (TR 1444-45). Ms. Trueblood asked Avdellas to check with VRA's HR Manager, Karen Biscella,

about the interview date and he did. (TR 1445-46). Avdellas testified he asked Biscella if it was unreasonable to interview an employee on her first day back from leave. (TR 1447). Biscella testified this was on March 28, 2002. (TR 627). At her deposition, Biscella had testified that Avdellas had asked, "How do I handle situations when a person has bid on a specific job but is not available for the interviews when they are being scheduled?" (TR 1448). Biscella testified she did not object to the scheduled interview and testified that she never told Avdellas Trueblood could not interview while on STD. (TR 704,1445, 1469). Ms. Trueblood reported Avdellas told her that Biscella would not permit the interview while she was on stress leave and that he could not extend the interviews. (TR1600, 1710).

In the meantime, Ms. Trueblood had called Avdellas informing him her leave had been extended until May 6 and she was unavailable on April 8. (TR 1473, 1600). She asked if HES could wait to interview her then. (TR 1449). Avdellas, who testified he was anxious to fill the position, did not want to extend the interview date and told Trueblood HES could not wait until May 6 to conclude the interviews. (TR 1449, 1600). Ms. Trueblood left a message with Cindy McCall, HES, asking for a written explanation why. (TR 1449). Avdellas, after consulting with HES HR, returned that call saying there was no reason for a written explanation. (TR 1450).

The remaining candidates for the CSR job were interviewed as scheduled. (TR 1473-4; HESX 6). Avdellas admitted that Trueblood never said she did not want to interview for the CSR position. (TR 1462). The HES interview committee recommended another VRA employee-applicant, Jill Robinson, get the job. (TR 1474). However, before hiring her, in early May 2002, HES LLC instituted a hiring-freeze and did not fill the position. (TR 1474, 1772; Zaengerle Dep. 45). Mr. Avdellas was informed of the freeze, in a telephone call from Dr. Zaengerle, April 7, 2002, the day after HES received Ms. Trueblood's whistleblower complaint. (TR 1452). According to Dr. Zaengerle, the freeze was implemented because the economy was not strong and HES was concerned about the financial performance of HES LLC. (Zaengerle Dep. 45-46).

However, the freeze was not "absolute" because, as of August 2002, Dr. Zaengerle could approve new hires into certain positions. (Zaengerle Dep. 46). Avdellas testified that as of August 7, 2002, the freeze was over. The position was not filled as of the date of the hearing. (TR 2234). HES HR Manager, Tonya Moore testified that the freeze applied not only to the East Liverpool CSR position but to an assistant in her own department (who was since hired). (TR 2236-37). Ms. Moore was unaware of any other position to which the freeze applied. (TR 2237). Avdellas testified that the freeze had been lifted by August 7, 2002. (TR 1452). In fact, Mr. Avdellas hired a technician for the 10-day facility in September 2002. (TR 2185). At some point, Dr. Zaengerle had informed Ms. Moore of Ms. Trueblood's termination from VRA, but not the reasons. (TR 2251).

Later, in the summer of 2002, the CSR position, with a college degree prerequisite, was again posted.[12] (TR 1453, 2232-34). At his August 28 deposition, Dr. Zaengerle testified that he

[12] Ms. Moore testified that HES has 40-45 CSRs and has never had a requirement for a degree. (TR 2234).

had looked at all job descriptions and it was changed because, "I wanted to dramatically improve the quality and education in many of our positions, such as technical sales reps, customer service reps . . . and that, of course, includes having a degree." (Zaengerle Dep. 47, 48). However, Ms. Trueblood lacked the degree and did not apply. Oddly, Ms. Moore, whose department handles job postings, testified, on November 19, 2002, that the CSR position only noted a "preference" for a degree. (TR 2232). Ms. Moore testified that Dr. Zaengerle informed her of Ms. Trueblood's termination from VRA, on October 28, 2002, but not the reasons. (TR 2251).

Mr. Sigg testified that he never had any conversation with Avdellas regarding Trueblood's application for the HES CSR position and never spoke to him regarding Trueblood at all. (TR 400-401). He testified he did not speak to Dr. Zaengerle about her application prior to April 8, 2002. (TR 400). Likewise, Karen Biscella, VRA HR Director, testified that she never discussed the March 11, 2002 meeting with Avdellas. (TR 681). Finally, Avdellas testified that Ms. Biscella never told him not to interview Ms. Trueblood as a result of the March 11, 2002 meeting. (TR 1469). Several witnesses considered Avdellas honest. (TR 218, 890,1138).

Ms. Trueblood returned to work, on May 6, 2002. (TR 1860; CX 30). She informed Ms. Biscella she was taking prescription medication that included a caution about causing drowsiness and operating heavy equipment. (TR 1603). She was told to advise her supervisor, Ms. Juanita Kuhn. Ms. Trueblood informed Ms. Kuhn she could not operate heavy equipment due to the medication. (TR 2312). Ms. Kuhn instructed her to perform drum crew duties not involving forklift operation. (TR 2317). She also signed up for overtime. (TR 1748, 1865). Ms. Kuhn, upon observing that, removed Ms. Trueblood from overtime. (TR 2314). VRA's policy prohibits voluntary overtime for employees on restricted duty, such as Ms. Trueblood. Ms. Trueblood protested arguing she had no restrictions and could operate the forklift. (TR 1866). According to Ms. Kuhn, when Trueblood returned from leave she was not permitted to operate forklifts, so one could say she was on restricted duty until VRA got a notice from her doctor that it was safe to work. (TR 2381). Both Ms. Kuhn and Ms. Knowles spoke with Ms. Trueblood about the policy and her medication's precautions. On May 7, 2002, before the matter was resolved, Ms. Kuhn found Ms. Trueblood operating the forklift and told her to stop. (TR 2384). Ms. Biscella and Mr. Rose, the VRA Safety Manager, decided Ms. Trueblood should obtain a doctor's note confirming it was safe to operate a forklift and told her to do so. (TR 637). Three days later, May 10, 2002, Ms. Trueblood e-mailed Ms. Biscella asking her to write her doctor explaining why a note was needed. (TR 1868). Ms. Biscella received the e-mail on May 13, 2002, and on May 14, 2002, faxed a letter to the doctor informing him of Ms. Trueblood's duties and inquiring if she could safely perform them while on medication. (VRAX 22). The doctor responded she could. (VRAX 23). Thereafter, Ms. Trueblood was allowed to sign up for voluntary overtime. (TR 1869; ALJ I, Stip. No. 24).

VRA gives employees 56 hours of paid absence time per twelve month period. (VRAX 1). It may be used for any purpose, but VRA "encourages" its use for "only personal illness or other important reasons." (VRAX 1-Policy 230). On May 31, 2002, VRA disciplined Ms. Trueblood for exceeding her 12-month allotment of 56 hours of personal absence time on

May 17, 2002. (VRAX 25). Ms. Trueblood had called to speak with Ms. Knowles (Ms. Kuhn, her immediate supervisor, was on vacation) before the beginning of her 3:00 P.M. shift, May 17, 2002. (TR 1606). She told Ms. Knowles she felt sick and would not be coming into work. (TR 531, 576).

According to Ms. Knowles, Ms. Trueblood did not ask Ms. Knowles if she could take the day as a vacation day, nor had she completed a vacation request form. (TR 577, 1871).[13] Yet, Ms. Knowles admitted that had Ms. Trueblood wanted sick leave she could merely have called in on VRA's "call-off" line. (TR 533). Moreover, she admitted some BOP group managers allow vacation time with less than seven days advance notice if they obtain coverage. (TR 534). Ms.Trueblood testified that since she was out of sick time, she had specifically requested vacation time. (TR 1608). Mr. Rose's testimony appears to corroborate Ms. Trueblood's version, i.e., that she had requested vacation time. Ms. Kuhn's own policy was that drum crew employees must complete a vacation request form seven days in advance. (TR 2319, 1870). If an employee failed to do so the time away was considered "absence" time by Ms. Kuhn. (TR 1870, 2319). Ms. Knowles testified she followed Ms. Kuhn's policy. (TR 577, 197, 1876). However, Mr. Cox, who had been a VRA manager a long time, testified that if an employee found a replacement most managers' policy was to allow vacation time.

VRA's Attendance Policy, No. 230, states that "Chronic or severe medical conditions that require frequent absences will be handled on a case-by-case basis. The intent is not to discipline an employee for medical situations beyond the control of the employee. However, a chronic medical condition that causes absence hours in excess of 56 hours will not be paid." (VRAX 1-Attendance Policy No. 230). The Policy adds that "[W]hen you call in to report your absence, <u>you may request</u> vacation in lieu of counting time toward the attendance policy. Your manager will exercise his/her judgment in approving or disapproving this request." (VRAX 1-1-Attendance Policy No. 230). The Attendance Policy does not say individual supervisors may or can develop their own policies, however, the testimony was that was the practice. Ms. Biscella testified that the purpose of Ms. Kuhn's seven-day advance notice for vacation requests was to enable VRA to get another employee to cover for the absent employee. Here, Ms. Trueblood had arranged for such coverage. Ms. Biscella admitted she had mentioned that the disciplinary matter was made "cloudy" due to the fact Ms. Trueblood had offered her own coverage. (TR 652). She testified that she later spoke with Knowles and Kuhn about their policies which cleared up the cloudiness. (TR 713).

On May 20, 2002, Ms. Kuhn received Ms. Trueblood's note saying she had taken a vacation day on May 17, 2002, and to check with Ms. Knowles if she had any questions. (TR 2321). After speaking with Ms. Knowles, Ms. Kuhn recorded the complainant's day off, on May 17, 2002, as sick leave. (TR2312). VRA's Attendance Policy permits 56 hours of <u>paid</u> absence time per rolling 12-month period. (Attendance Policy No. 230). Subject to specific

[13] Both Ms. Knowles and Steve Lorah, whose testimony about one side of a telephone conversation I give little credence, who reported to the Merit Committee, reported the term "vacation" was not raised in the conversation. (TR 2425).

exceptions, employees taking more than the 56 hours are not paid for the absence and may be disciplined for excessive absenteeism. (VRAX 1-Attendance Policy No. 230). As of May 17, 2002, Ms. Trueblood had already taken the maximum 56 hours during the previous 12 months. (TR 1876). Ms. Trueblood had relied on CX 93 in believing she had recaptured absence time on each anniversary of a usage in the prior year. (TR 1927-28, 1996).

As a result of the 5/17/02 violation, on May 31, 2002, the VRA Disciplinary Committee gave her a "minor offense" for exceeding the limit.[14] (VRAX 25). A minor offense is said to be the standard discipline for excessive absenteeism. (TR 714, 1952-53; VRAX 30, 63). Ms.Trueblood's appeal to the MERIT team, which she was told could not reach a consensus, was not approved. (CX 32; TR 2400). Oddly, Steve Lewis, a substitute member of the MERIT committee testified that they had reached the consensus that Ms. Trueblood had "jumped through hoops" to cover her work for May 17, 2002, and that the discipline should be reduced to a reprimand.[15] (TR 1491, 1494). Without the eight hours charged against her for May 17, 2002, Ms. Trueblood would not have gone four hours over the 56-hour limit in October 2002, which was a basis for her discharge. Moreover, she claims she was not paid for the 8 hours of absence on May 20, 2002. (TR 1994).

On May 22, 2002, while Ms. Trueblood was working with Ms. Kuhn unloading waste drums from a truck and moving them on the conveyor belt, the latter saw her jam her utility knife into the fail-safe release button for the drum conveyor. (TR 578, 1882, 2334). Kuhn told her to remove it and not do it again. (TR 1884-5). Ms. Trueblood testified the drum crew had been doing this for at least the past two years and the practice was not hidden. (TR 1618-19). Ms. Kuhn wrote a memo about it and informed her supervisor, Ms. Knowles. (TR 2335; VRAX 24). According to VRA's Safety Manager, Mr. Rose, Ms. Trueblood had risked electric shock or electrocution; had violated OSHA standards by overriding a "kill" or fail-safe button; and had bypassed the employer's safety logic. (TR 2402-4). On May 31, 2002, the VRA Disciplinary Committee met to consider the matter. (TR 717). It found a serious safety violation. That, in combination with Ms. Trueblood's two prior disciplinary offenses (careless forklift operation and excessive absenteeism) led them to recommend she receive a major offense and two weeks suspension without pay. (TR 717). Mr. Sigg agreed with the major offense, but reduced the suspension to one week. (TR 444, 718). The suspension began June 3, 2002. (VRAX 27).

As a result of VRA's investigation, two other employees admitted engaging in the same conduct. (TR 579-80). They were also issued major offenses. (TR 1886; ALJ I-Stip. No. 29; VRAX 28, 29). One of the two, a probationary employee, appealed resulting in reduction of the discipline to a minor offense and a three-month extension of his probationary period. (VRAX

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[14] The Disciplinary Committee members include: the affected person's department manager; HR manager; Safety Manager; and, the Area/Group Manager if applicable or in the Department Manager's discretion. (VRAX 1). The Committee investigates and proposes disciplinary action to the Plant Manager and VP Marketing for approval. (VRAX 1).

[15] The MERIT Committee is made up of employees from each department which informally reviews discipline in comparison with a VRA "values" wheel (CX 55) and makes recommendations to management. (TR 1489-90).

30). Safety Manager, Mr. Rose, testified that another reason the probationary employee's discipline was reduced was because of his "openness and honesty" admitting he did it, but not knowing it was wrong. (TR 2405). However, Trueblood had also related she did not know it was wrong. Kuhn canvassed the employees about this. (TR 2375-6). The remainder of the drum crew members denied having used a utility knife this way. (TR 579). However, Ms. Knowles confirmed that Mr. Doug Bowers told her the day after the incident that he had done so for years. (TR 537, 580, 1620). He was one of the two to be disciplined, although he no longer worked on the drum crew, after he spoke in Trueblood's behalf at her disciplinary meeting. (TR 447, 1622). Moreover, Bowers had "trained" Trueblood on the procedure. (TR 717). According to Mr. Sigg, the remainder of the drum crew was given a "verbal reminder" not to improperly use the buttons, not discipline. (TR 341).

In May 2002, Ms. Trueblood asked Ms. Knowles about making up training she had missed while out on leave. (TR 575). Ms. Knowles permitted her to make it up and provided the necessary information. (TR 575; ALJ I-Stips. No. 25). However, the complainant never followed through. (TR 575).

After the completion of her one-week suspension, in June 2002, Ms. Trueblood again took STD until July 2, 2002. (TR 772,1889; VRAX 56, 57). In accordance with VRA policy, she was paid 60% of her regular salary. (TR 719, 1889). While on leave, Ms. Trueblood asked Ms. Biscella for permission to attend a training day. (TR 719, 1593). The latter permitted it on the condition her doctor approve. (TR 719). It was scheduled from 6:00 A.M. to 2:00 P.M., June 17, 2002. Ms. Trueblood arrived at 6:00 A.M., but left and walked around the facility asking employees for documents which she did not receive. (TR 591-92, 1642). She then informed Mr. Cox she was ill and went home early, at about 11:00 A.M.. (TR 720; CX 5).

In June 2002, VRA eliminated its self-funded STD plan to save costs and improve efficiency and purchased a STD plan administered by a third party administrator. (TR 441). VRA grand-fathered Ms. Trueblood and several others under its earlier plan so they would not lose benefits as a result of the change. (TR 702, 1804).

Ms. Trueblood returned from STD, on July 2, 2002. During her shift, she became ill and had to be hospitalized. The cause was apparently withdrawal from prescription medication. (TR 583, 1889, 2055). She returned to work on July 8, 2002. (TR 2058). After two work days, she again became ill and was taken to the hospital. (TR 586, 2059). Dr. Spahija undertook her care. (TR 2060). She remained off work until August 26, 2002, mostly under the STD program. (TR 725). She used 16 hours of absence time when stranded in Texas, due to an airline's bankruptcy, causing her to miss a doctor's appointment needed to release her back to work from STD.

Ms. Trueblood had sought prescription drug abuse treatment assistance from Gateway, part of VRA's Employer Assistance program. (TR 724). Gateway advised VRA that it should require Ms. Trueblood provide a "return to work" slip from her doctor and Gateway before

returning to work. (TR 646). Ms. Biscella passed this on to the complainant. (TR 647). However, the requirement was dropped and never enforced since Ms. Trueblood withdrew from the treatment program. (TR 649, 2063). On August 23, 2002, Ms. Trueblood gave VRA a doctor's note, from Dr. Spahija, permitting her to return to work on restricted duty, but restricted her from operating heavy machinery. (VRAX 42; TR 2060-61, 2392). Mr. Rose, the Safety manager had reservations over safety. (TR 2391-92). He therefore recommended Ms. Biscella fax her job description to the doctor and ask if Ms. Trueblood could perform them safely. ((TR 727; VRAX 43). In response, the doctor expanded her restrictions-restricting her from operating heavy equipment and "dealing with hazardous waste." (VRAX 44). As a result of the expanded restrictions, Ms. Trueblood was assigned to work at home. (TR 729, 2393). Other employees had had similar assignments. (TR 2393). She was paid her regular hourly wages. (TR 2065). She worked at home from August 26, 2002, until September 16, 2002, when her doctor certified she was "able to go back to work, no forklift, no truck at work." (TR 2068).

On October 17, 2002, Ms. Trueblood called off work. (TR 2031-33). Ms. Trueblood testified she suffered severe cramping as part of her monthly female cycle and called off because she was sick. (TR 1934-35). According to VRA, since she had already accumulated 52 hours of paid absence time during the previous 12-month period, the October 17 call-off caused her to exceed the maximum 56-hours. (CX 89). She discussed the calculations with Ms. Dotson, who claimed she had gone over the 56 hours. Ms. Trueblood had to use sick leave and vacation time in August 2002 to carry her through until the time she could return to work because she ran out of STD. (TR 1649).

On October 23, 2002, Ms. Trueblood e-mailed Ms. Natali, OEPA, concerning a Heritage truck she had checked-in and she had been told to accept unmanifested empty fiber containers with hazardous waste labels affixed and put the others in HES' 10-day facility. (TR 1980-81; HESX 13). According to Ms. Trueblood, the "empty" containers were not RCRA-empty, that is they had not been triple washed. (TR 1982, 2024-25).

Ms. Trueblood, herself, had not anticipated how VRA would apply the eight hours of unpaid leave she was docked on May 17, 2002. (TR 1935, 1996). She did not think VRA would count the unpaid 8-hours for May 17, 2002, as part of the total 56-hour figure.[16] (TR 2013). The Disciplinary Committee agreed her current excessive absenteeism warranted a minor offense. (CX 89). The Committee also reviewed her disciplinary record, i.e., three minor offenses (5/22/01-forklift; 5/17/02-absenteeism; 10/17/02-absenteeism) and a major offense with a one-week (5/22/02-utility knife) suspension, and recommended her termination. (VRAX 1, 25-27; CX 89; TR 1913, 2441). Mr. Sigg and Ms. Duggan agreed and she was thus terminated on October 25, 2002, based upon her cumulative disciplinary record. (CX 88). Mr. Sigg made the ultimate determination. (TR 1906). Ms. Trueblood's appeal was unsuccessful. (CX 90; TR 1976).

[16] Indeed, not only had Ms. Trueblood been disciplined for the May 17, 2002, absence as excessive, she was also not paid for it.

Mr. Sigg had not felt there had been sufficient grounds to terminate Ms. Trueblood after the earlier "utility knife" incident. (TR 1907). But, he did after the October 2002 absence. (TR 1907-8). According to Sigg, Trueblood was fired based upon her cumulative disciplinary record at the time of her discharge. (TR 1908). He also testified that VRA's termination policy is "not clearly black and white." (TR 343). That is while the policy states two major offenses could lead to termination, it does not have to, as a termination is made "on an individual basis. . . done as a last resort, when there is obviously no other opportunity." (TR 343). VRA had three other employees who had exceeded the 56-hour limitation, on May 17, 2002, August 13, 2002, and September 9, 2002, none of whom were discharged, but two of whom received "minor" offenses. (TR 2029-2031; VRAX 59, 63).

Von Roll AG, Switzerland, has two separate business lines: (1) the engineering and construction of waste incineration plants; and, (2) the operation of such plants. (Zaengerle Dep. 22-23). Dr. Rudoph Zaengerle is Von Roll AG's Executive Vice President and has been for the last ten years. (Zaengerle Dep.10). He is also the President of VRA, the President of Von Roll Holding, and President of HES LLC. (Zaengerle Dep. 1–12). Dr. Zaengerle testified he first became aware of Trueblood's whistleblower complaint a few months prior to his August 2002 deposition shortly after it was filed. (Zaengerle Dep. 12). He added that he had not had any personal involvement in her discipline. He was informed by HES HR, Tonya Mohr, that Ms. Trueblood had filed a complaint against HES as well. (Zaengerle Dep. 13).

About ten years ago, Von Roll America, Inc., ("VRA") was created by Von Roll AG to own and operate an incinerator in East Liverpool, Ohio. Dr. Zaengerle was appointed President of VRA. (Zaengerle Dep. 10). Von Roll AG owned 100% of VRA's ownership through a holding company, Von Roll USA Holding. (Zaengerle Dep. 22). Dr. Zaengerle is primarily responsible for VRA HR matters, but mostly delegates that function. (Zaengerle Dep. 40).

HES, which is completely separate and unrelated to Von Roll AG, according to Dr. Zaengerle, began its environmental business some 30 years ago. (Zaengerle Dep. 19). Within the past two years, HES decided to acquire an ownership interest in VRA. (Zaengerle Dep. 21, 27-28). HES created a separate company called Heritage WTI LLC to "hold" its interest in VRA. (Zaengerle Dep. 27-28). Von Roll USA Holding ultimately sold 51% of its ownership interest in VRA to HES WTI LLC. (Zaengerle Dep. 21). Heritage Environmental Services, Inc., is not an operating company. (Zaengerle Dep. 28). The Heritage companies are primarily owned by the Fehsenfeld family. (Zaengerle Dep. 29).

Heritage WTI LLC owns 51% of the stock of Von Roll America. (ALJ I; Stipulation 1; ALJ IV; HESX 4). VRA Holding, USA, owns 49% of the Von Roll America stock. 99% of Heritage WTI, LLC, is owned by HES Environmental Services, LLC, a respondent herein. HES LLC Board members are Ken Price, Fred Fehsenfeld, Jr., and James Fehsenfeld. (Zaengerle Dep. 36). Fred Fehsenfeld is also on VRA's Board, but the companies share no other board members. (TR 247). Dr. Rudoph Zaengerle is President of HES, LLC, and President of VRA. (Zaengerle Dep. 8, 10). He is also Mr. Sigg's supervisor and responsible for his discipline. (Zaengerle Dep.

51). Heidi Duggan is a Vice President for HES, LLC, and a Vice President of VRA. (TR 237, 1432; Zaengerle Dep. 52).

In 2001, HES opened a 10-day transfer facility in East Liverpool, Ohio. (TR 1429-30). It is a specific site used by HES to consolidate loads of hazardous and non-hazardous material for ultimate transport to an incinerator or another HES facility. (TR 2117). It is not a "storage" area; it is a "transfer" facility. (TR 2118). It is not covered by VRA's waste storage permit, but regulated under the Department of Transportation ("DOT") regulations. (TR 2191, 2118).

The lease between HES and the Columbiana County Port Authority for the 10-day facility was signed August 20, 2001, and HES began accepting waste there on August 30, 2001. (TR 1479).

VRA is a separate company that operates a hazardous waste incinerator, adjacent to the Port Authority.[17] (Zaengerle Dep. 18, 22-23). VRA is commonly referred to as "WTI". (Zaengerle Dep. 19). HES and VRA have separate HR departments responsible for employee relations at their respective companies. (TR 401-402, 678-681, 2213-2218). Mr. Sigg, who holds no management position with HES, manages VRA's day-to-day operations. (TR 398). Mr. John Avdellas, who holds no management position with VRA, manages HES' day-to-day operations. (TR 1429). Each facility, HES and VRA, pays for its own leases and maintains its own bank accounts. (TR 418-9). Each company has its own separate environmental and accounting staffs. (TR 418-9). Each is responsible for its own taxes and safety training. (TR 418-9). The two companies do not share a common chief financial officer or comptroller. (TR 419). However, they share payroll and computer services. (Zaengerle Dep. 49, 51; VRAX 47). They also have a waste contract. (VRAX 46; TR 422). Dr. Zaengerle has offices in East Liverpool, (HES) Indianapolis, and possibly Zurich. (TR 248).

Further illustrations of the separateness of the two companies include:

VRA HR has no supervisory control over HES' HR department.

HES has no supervisory control over VRA's HR Department.

VRA has its own employee handbook.

VRA has not adopted HES' employee handbook.

HES did not draft VRA's handbook.

VRA has its own HR policies.

[17] Ms. Moore, HES HR and Safety Manager, testified VRA is an affiliate of HES LLC. (TR 2269).

VRA's HR policies are separate from HES' HR policies.

VRA has its own benefits plans.

VRA's benefit plans are separate from HES' benefits plans.

HES' employees cannot be on VRA's benefits plans unless they are otherwise eligible because their spouse is a VRA employee.

VRA has its own health care plan.

HES' employees cannot be on VRA's health care plan.

VRA has its own bonus and pay structure.

VRA has not adopted HES' pay and bonus structure.

VRA and HES are responsible for entering their own time in the payroll system.

The HES Manger's manual is not distributed to VRA managers.

The HES employee handbook is not distributed to VRA employees.

The two companies have separate STD plans.

The two companies have different administrators for their 401(k) plans.

The two companies have different attendance policies.

The is no reference to VRA in HES' employee handbook.

The is no reference to VRA in HES' manager's manual.

When an employee begins work at HES, after previously working for VRA, that employee's benefits and date of hire do not transfer to HES.

(TR 401-409, 418-422, 680-687, 2215-2232, 2235, 2260-2264). However, HES subcontracts with VRA for some transport services. (TR 1467). Heritage/WTI LLC, which is 99% owned by Heritage Environmental Services LLC, owns 51% of VRA. HES controls a majority of the members of VRA's board, according to Mr. Sigg. (TR 472).

THE LAW

Jurisdiction

In *Jayko v. Ohio EPA*, 1999-CAA-5 ALJ Oct. 2, 2000), Administrative Law Judge Phalen wrote:

> [A] complainant can assert jurisdiction under all of these statues in the same proceeding, if the complainant has participated in activities in furtherance of theobjectives of all the statues. *See, Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y, May 18, 1994); *Minnard v. Nerco Delamar Co.*, Case No. 92-SWD-1, (Sec'y, Jan. 25, 1994). The employee protection provisions have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. *See, Devereux, supra, and Tyndall v. U.S. Environmental Protection Agency*, 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998).

Although earlier cases, under the ERA, suggest that an employer must be a "licensee" or applicant for a license of the Nuclear Regulatory Commission ("NRC"), in order for subject matter jurisdiction to exist, i.e., *Billings v. OWCP*, 91-ERA-35 (Sec'y Sept. 24, 1991), that narrow criterion appears to have been relaxed, particularly relating to the other environmental acts under which a whistleblower action may be instituted.

Thus, in *Minnard v. Nerco Delamar* Co., 92-SWD-1 (Sec'y Jan. 25, 1994), the Secretary held that "under the SWDA whistleblower provision an employee's reasonable belief that his employer is violating the Act may--depending on the particular facts of the case--be sufficient basis for a retaliation claim if the employer allegedly takes action against that employee because he [or she] expressed his [or her] belief, irrespective of after-the-fact determinations regarding the correctness of the employee's belief."

In *Sasse v. U.S. Department of Justice*, ARB No. 99-053, ALJ No. 1998-CAA-7 (ARB Aug. 31, 2000), the respondent asked the Administrative Law Judge to certify the question of subject matter jurisdiction as a controlling question of law so that an interlocutory appeal could be taken to the Administrative Review Board. The issue, as framed by the respondent, was "whether a federal employee alleges protected activity if he alleges nothing more than carrying out assigned federal duties relating to the enforcement of federal environmental law...." The ALJ certified the question. The ARB, however, ruled that the respondent's appeal "confused the Labor Department's subject matter jurisdiction over an environmental whistleblower complaints with the wholly separate question whether [Complainant's] actions might be covered as "protected activities" under the environmental statutes. .... 'A court is said to have jurisdiction, in the sense that its erroneous action is voidable only, not void, when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth

in the paper writing invoking the court's action is not obviously frivolous.' *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 591 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954)(emphasis supplied)." Slip op. at 3 (some citations omitted).

*Elements of Acts' Violation*s

The various Acts are similar in defining protected activity. Under CERCLA, an employee engages in protected activity if he or she:

> 1) has provided information to a State or to the Federal Government;
> 2) filed, instituted, or caused to be filed or instituted any proceeding under this chapter;
> 3) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

42 U.S.C. §9610(a). The objective of the Act is to prevent the release of hazardous substances into the air or water.

Under the Energy Reorganization Act of 1974, an employer may not discharge or discriminate against any employee because the employee:

> 1) notified the employer of an alleged violation of the Act or the Atomic Energy Act;
> 2) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act;
> 3) testified before Congress or at any Federal or State proceeding;
> 4) commenced, caused to be commenced, or is about to commence a proceeding under this chapter or a proceeding for administration or enforcement of any requirement imposed;
> 5) testified or is about to testify in any such proceeding;
> 6) assisted or participated, or is about to participate, in any manner in such a proceeding or in any other action to carry out the purpose of this chapter.

(Emphasis added). 42 U.S.C. §5851 (a)(1). The Act deals with nuclear issues.

Under the Toxic Substances Control Act, an employee is protected from employer discrimination or discharge if the employee:

> 1) commenced, caused to be commenced, or is about to commence a proceeding;
> 2) testified or is about to testify in any such proceeding;
> 3) assisted or participated in any manner in such a proceeding or any other action to carry out the purposes of this chapter.

42 U.S.C. §300j-9[i] and 15 U.S.C. §2622(a). The primary purpose of the Act is to "assure that chemical substances and mixtures do not present unreasonable risks of injury to health or the environment."

Under the Water Pollution Control Act, or "Clean Water Act", an employer may not fire or discriminate against any employee if the employee:

> 1) has filed, instituted, or caused to be filed or instituted, any proceeding covered under this chapter;
> 2) has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter.

33 U.S.C. §1367(a). The Act is designed to "restore and maintain chemical, physical, and biological integrity of the Nation's waters."

The implementing regulations at 29 C.F.R. Part 24, state the following with regard to the Acts summarized above: No employer may discharge or other discriminate against any employee because the employee has:

> 1) Commenced or caused to be commenced or is about to commence a proceeding for the administration or enforcement of any requirement imposed under one of the Federal Statutes listed above;
> 2) Testified or is about to testify in any such proceeding;
> 3) Assisted or participated, or is about to assist or participate in a proceeding or in any other action;

Case law has interpreted which employee acts are considered protected activity under the various employee protection laws and regulations. An employee's informal complaint constitutes protected activity under §5851(a). *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). *See also, Jones v. Tennessee Valley Authority*, 948 F2d 258 (6th Cir. 1991); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985); *Mackowiak v. Univ. Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982). If an employee talks about safety to a plant official, an employer, or regulator, he or she acts squarely within the zone of conduct that Congress marked out under 42 U.S.C. §5851(a)(1). Employees who notify their employer of an alleged violation rather than a federal regulator are provided whistleblower protection. *Stone & Webster Engineering Corporation v. Herman*, 115 F.3d 1568 (11th Cir. 1997). The Eleventh Circuit upheld the Secretary's interpretation of §5851(a) as shielding the expression of safety-related concerns to fellow workers, when the expression has a public dimension and fits closely into an extended pattern of otherwise protected activity.

The Secretary has interpreted the phrase "any other action" under §5851(a)(3) to extend beyond mere participation in a proceeding. *Bechtel Construction Co. v. Secretary of Labor*, 50

F.3d 926, 932 (11th Cir. 1995). The Eleventh Circuit Court of Appeals upheld the Secretary's interpretation, stating that "it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws." The court reasoned that this interpretation "promotes the remedial purposes of the statue and avoids the unwitting consequence of preemptive retaliation, which would allow the whistleblowers to be fired or otherwise discriminated against with impunity for internal complaints before they have a chance to bring them before and appropriate agency." *Id*. Furthermore, allowing internal complaints permits safety concerns to be raised promptly and avoids the unnecessary expense and delay of formal investigations. *Id*. at 933.

Using similar language to §5851(a)(3), 29 C.F.R. Part 24, which covers the five Acts the complainants allege were violated, extends protection to those who assisted or participated, or are about to assist or participate in a proceeding or in any other action.

Standards of Proof

The employee protection provision of the ERA, 42 U.S.C. §§ 5851, were amended by Congress in 1992 "to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-805, 93 S.Ct. 1817 (1973)." *Trimmer v. United States Department of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). Under the ERA and other statutes set forth above, during the investigative process, a complainant is required to establish a *prima facie* case that her protected activity is a contributing factor in the unfavorable personnel action alleged in the complaint. It was the intent of Congress to make it easier for whistleblowers to prevail in their discrimination suits, but it was also concerned with stemming frivolous complaints. *Trimmer*, at 1101, n. 5. "Even if the employee establishes a *prima facie* case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. Thus, only if the employee establishes a *prima facie* case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence may the Secretary even investigate the complaint." *Id.*

Once the case proceeds to a formal hearing before the Secretary, the complainant must prove the same elements as in the *prima facie* case, but must prove by a preponderance of the evidence that she engaged in protected activity which was a contributing factor in the employer's alleged unfavorable personnel decision. *Trimmer,*at 1101-1102; *See Dysert v. Secretary of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997)(holding that the complainant's burden is a preponderance of the evidence). Thereafter, and only if complainant meets her burden, does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. *Trimmer*, at 1102.

A *prima facie* case requires: (1) that the employee is governed by the Act; (2) that he or she engaged in protected activity as defined by the statutes; (3) that as a result of such activity, he

or she suffered adverse employment action, such as discharge; and (4) that a nexus existed between the protected activity (as a contributing factor) and the adverse action or circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. §§ 24.5(b)(2)(i)-(iv); *Macktal v. U.S. Department of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); *Zinn v. University of Missouri*, Case No. 1993-ERA-34 (Sec'y Jan. 18, 1996); *Overall v. Tennessee Valley Authority*, Case No. 1997-ERA-53 at 12 (ARB Apr. 30, 2001). The foregoing creates an inference of unlawful discrimination. With respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation. *Id*., and cases cited.

In *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. §§ 1221(e)(1), the Court observed:

> The words "a contributing factor" . . . mean <u>any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision</u>. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating,""substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, at 1140 (citations omitted).

If a complainant presents a *prima facie* case showing that protected activity was likely a contributing factor in the unfavorable personnel action, then the respondent has an opportunity to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 29 C.F.R. §§ 24.5(c)(1) and Part 1979. In other words, a respondent may avoid liability under the Acts by producing sufficient evidence that clearly and convincingly demonstrates a legitimate purpose or motive for the personnel action. *See Yule v. Burns Int'l Security Service*, Case No. 1993-ERA-12 (Sec'y May 24, 1995). Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than "preponderance of the evidence" but less than "beyond a reasonable doubt." *See Yule*, *supra* at 4.

If a respondent meets its burden to produce a legitimate, nondiscriminatory reason for its employment decision, the inference of discrimination is rebutted. The complainant must then assume the burden of proving by a preponderance of the evidence that the respondent's proffered reasons are "incredible and constitute pretext for discrimination." *Overall*, at 13. As the Supreme Court noted in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519, 113 S.Ct. 2742, 2753 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory, explanation for adverse action permits rather than compels a finding of intentional discrimination. *See also Blow v. City of San Antonio, Texas*, 236 F.3d 293, 297 (5th Cir. 2001).

In reviewing the numerous cases on the shifting burden of production and ultimate burden of proof, the U.S. Court of Appeals for the Eighth Circuit, in *Carroll v. U.S. Department of*

Labor, 78 F.3d 352, 356 (8th Cir. 1996), *aff'g Carroll v. Bechtel Power Corp.*, Case No. 1991-ERA-46 (Sec'y Feb. 15, 1995), observed:

> But once the employer meets this burden of production, "the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). The presumption ceases to be relevant and falls out of the case. The onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reasons for the challenged employment action and the ultimate burden of persuasion remains with the complainant at all times. *Burdine*, 450 U.S. at 253, 256.

Accordingly, the fact a complainant has established a *prima facie* case becomes irrelevant. Rather, the relevant inquiry becomes whether the complainant has proven by a preponderance of the evidence that the respondent retaliated against him or her for engaging in a protected activity. *Carroll, supra* at 356.

The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the employer's proffered reason for the adverse personnel action is not legitimate, and that the discharge was motivated at least in part by retaliation for protected activity, then the employer must establish by "clear and convincing" evidence that it would have taken the same unfavorable personnel action in the absence of protected activity.[18] *See Mount Healthy City Sch. Dist. v. Doyle,* 429 U.S. 274 (1977)(preponderance standard); *Stone & Webster Engineering Co. v. Herman*, 115 F.3d 1568 at 1572 (preponderance standard).

Protected Activity

The first requisite element in establishing a *prima facie* case is a showing of "protected activity." In ERA cases, the courts limit protected activity to reports of an act which implicates safety definitively and specifically. *See American Nuclear Resources v. U.S. Department of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998) citing *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926 11th Cir. 1995).[19] "The ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." *American Nuclear Resources*, at 1295, *supra, citing Stone, supra*, at 1574; *Decresci v. Lukens Steel Co.*, 87-ERA-13 (Sec'y Dec. 16, 1993) (the environmental whistleblower provisions are intended to

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[18] In *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (1984), the Ninth Circuit held the *Mt. Healthy* "dual motive" analysis was permissible under the ERA.

[19] In *Bechtel*, the court protected a carpenter's acts disagreeing with his foreman about the procedure for protecting radioactive tools. In *American Nuclear Resources*, the court declined to find a complaint regarding an isolated event alleging no safety breach constituted a protected activity. The *Stone* court found the complainant's speech in a meeting with his co-workers constituted protected activities because he was acting in furtherance of safety compliance and it served as another notice to the employer. A complaint to a mine safety committee would have been sufficient in *Phillips, infra* at 778.

apply to environmental and not other types of concerns.). However, an employee's complaints may constitute "reasonably perceived violations" of the environmental acts. *Johnson v. Old Dominion Security*, Case Nos. 1986-CAA-3, 1986-CAA-4 and 1986-CAA-5 (Sec'y May 29, 1991); *see also Crosby v. Hughes Aircraft Co.*, Case No. 1985-TSC-2 at 14 (Sec'y Aug. 17, 1993).

The Secretary has broadly defined a "protected activity" as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it does not matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations." *Minard v. Nerco Delamar Co*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8 (it is insufficient to show only that the environment may be negatively impacted by the employer's conduct). It is clear that actual violations need not be proven to have occurred. *Diaz-Robinas v. Florida Power and Light Co.*, Case No. 92-ERA-10, Sec'y Dec., Jan. 19, 1996, slip op. At 11. N. 7, and *Melendez, supra*. The alleged act must implicate safety definitively and specifically. In other words, the complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v Westinghouse Hanford Co*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

It is beyond cavil that filing a nuclear or environmental whistleblower complaint with the U.S. DOL is a protected activity. *Smith v. ESICORP*, 93-ERA-16 (Mar. 13, 1996); *Bryant v. EBASCO Services, Inc.*, 88-ERA-31 (April 21, 1994). Moreover, meeting with DOL investigators or testifying in a DOL whistleblower proceeding is protected. *Thompson v. TVA*, 89-ERA-14 (July 19, 1993).

Temporal proximity may be sufficient to raise an inference of causation in a whistleblower case. *Tracanna v. Arctic Slope Inspection Service*, Case No. 1997-WPC-1 at 8 (ARB July 31, 2001). As the Board recognized in *Tracanna*, "where protected activity and adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation is compromised."

The application of disparate treatment in whistleblower cases requires a showing that employees with whom a complainant seeks to compare herself are "similarly situated" to evince a suggestion of retaliation from different treatment. *See Tracanna, supra* at 9.

Internal complaints made to company supervisors concerning safety and quality control are protected activities under the ERA. *Bassett v. Niagara Mohawk Power Corp.*, Case No.

1985-ERA-34 (Sec'y Sept. 28, 1993).[20] The Administrative Review Board (herein Board) and the remaining Federal Circuit Courts have repeatedly held that internal complaints constitute protected activity under the ERA.[21] *See Hermanson v. Morrison Knudsen Corp.*, Case No. 1994-CER-2 (ARB June 28, 1996); *Dysert v. Westinghouse Electric Corp.*, Case No. 1986-ERA-39 (Sec'y Oct. 30, 1991); *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 at 1513 (10th Cir. 1985), *cert. denied* 478 U.S. 1011 (1986); *Passaic Valley Sewerage v. U.S. Department of Labor*, 992 F.2d 474, 481 (3d Cir. 1993); *Guttman v. Passaic Valley Sewerage Commissioners*, Case No. 85-WPC-2, *aff'd, Passaic Valley Sewage Commission v. U.S. DOL*, 992 F.2d 474 (3d Cir. 1993)(complaints to management that sampling method of monitoring industrial waste treatment system users was "meaningless and unreliable" constituted protected activity), aff'd No. 92-3261 (3rd Cir. Apr. 16, 1993); *Wagner v. Technical Products, Inc.*, case no. 87-TSC-4 (Bringing safety issues to immediate supervisor was protected activity under the TSCA.)*; Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), *appeal dismissed*, No. 92-5176 (11th Cir. Dec. 18, 1992); *Dysert v. Westinghouse Electric Corp.*, 86-ERA-39 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected); *Crosier v. Portland General Electric Co.*, 91-ERA-2 (Sec'y Jan. 5, 1994) (complainant's questioning his supervisor about an issue related to safety constituted protected activity).

Specifically, in *Mackowiak*, *supra*, the Ninth Circuit Court of Appeals, relying on precedent applicable here, held that Section 5851 of the ERA protects quality control inspectors from retaliation caused by internal complaints regarding safety or quality problems. In addition, the Court recognized that enforcement of safety regulations may cause expense and delay to the employer. The Court wrote:

> [a]t times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay. If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems. 735 F.2d at 1164. The employer in *Mackowiak* in turn argued that regulatory scheme requires companies to retain "abrasive, insolent and arrogant" quality control inspectors if they comply technically with the requirements of the job. *Id.* The Court flatly rejected the employer's argument and maintained that the ruling simply forbids discrimination based on competent and aggressive inspection work. *Id.* The Court concluded that contractors regulated by § 5851 may not discharge quality control inspectors because they do their jobs too well. *Id.*

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[20] I note, however, that the U.S. Court of Appeals for the Fifth Circuit has repeatedly held that internal complaints are not protected activity within the context of the Energy Reorganization Act. *See Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984); *Macktal v. U.S. Department of Labor*, 171 F.3d 323 (5th Cir. 1999).

[21] The Court's statement, in *Stone* at 1574, that "[W]histleblowing must occur through prescribed channels" refers to the channels set forth in the statute, not to channels established by an employer.

Knowledge of Protected Activity

Knowledge of protected activity may not be imputed to a supervisor without proof. The Secretary has held that knowledge of the protected activity on the part of the alleged discriminatory official is an essential element of a complainant's whistleblower case. *Bartlik v. TVA*, Case No. 88-ERA- 15, Sec. Ord., Dec. 6, 1991, slip op. at 7 n.7, and Sec. Dec., Apr. 7, 1993, slip op. at 4 n.1, *aff'd*, 73 F.3d 100 (6th Cir. 1996). Although knowledge can be shown by circumstantial evidence, that evidence must show that an employee of the respondent with authority to take the complained of action, or an employee with heavy or substantial input in that decision, had knowledge. *Id.*; *Mosely v. Carolina Power & Light*, 94-ERA-23 (Final Decision & Order, August 23, 1996, Administrative Review Board) citing *Bartlik*; and, *Thompson v. TVA*, 89-ERA-14 (Sec'y July 19, 1993).

Complaints to State or Local Authorities

Contacting state and local authorities, here, such as the OEPA, is protected activity. *Hanna v. School District of Allentown*, 79-TSCA-1 (July 28, 1990), *rev'd on other grounds, School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981); *Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Jan. 13, 1993).

Discriminatory Acts

The definition of discriminatory acts, under 29 C.F.R. Part 24, is broad. See, e.g., *Bassett v. Niagara Mohawk Power Corp*., 86-ERA-2, Case No. 1985-ERA-34 (Sec'y Sept. 28, 1993)(Denial of parking privileges); *Hill, et al. V. TVA*, 87-ERA-23/24 (May 24, 1989)(Refusal to refer employee for work); *Flanagan v. Bechtel Power Corp.*, 81-ERA-7 (June 27, 1986)((Refusal to hire); *Jenkins v. EPA*, 92-CAA-6 (May 18, 1994)(Reassignment to less desirable position); *Thomas v. APS*, 89-ERA-19 (September 17, 1993)(Retaliatory harassment); *Mandragar v. Detroit Edison Co.*, 88-ERA-17 (Sec'y Mar. 30, 1994)(Referral to Employee Assistance Program; *Helmstetter v. Pacific Fas & Electric Co.*, 86-SWD-2 (Sec'y Sept. 9, 1992)(Disciplinary or warning letter that progresses one toward suspension or discharge); *Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Sec'y July 26, 1995)(Forced return from medical leave); *Studer v. Flowers Baking Tennessee, Inc.*, 93-CAA-11 (Sec'y June 19, 1995)(Training and education programs are a privilege of employment); *Artrip v. Ebasco Services, Inc.*, 89-ERA-23 (Sec'y Mar. 21, 1995)(Interference with former employee's prospective employment opportunities); *Berkman v. U.S. Coast Guard Academy*, ARB No. 980056, ALJ No. 1997-CAA-2 (Feb. 29, 2000)("Singling out" employee/reduction in job duties).

In *Mandragar v. Detroit Edison Co.*, 88-ERA-17 (Sec'y Mar. 30, 1994), the Secretary indicated if a supervisor tells an employee that it was improper to go to the Nuclear Regulatory Commission ("NRC") with a problem because the company would have resolved it, that the statement constitutes evidence of a retaliatory motive. The Secretary rejected the judge's

conclusion that such statements were "legitimate statements of the employer's view of how employees should more properly present safety concerns."

Constructive Temporary Medical Leave of Absence or Temporary Layoff

The complainant's counsel argues there is no reason the law relating to constructive discharge cannot apply to constructive temporary medical leaves of absence or layoffs. Unfortunately the complainant has not cited specific legal authority for the proposition and I decline to adopt or create it here. However, I observe the standard for finding constructive discharge is higher than for finding a hostile work environment. *Berkman, supra*. The fact one has established a hostile work environment is not enough by itself to prove constructive discharge. *Berkman, supra, citing Moore v. KUKA Welding Systems,* 171 F.3d 1073, 1080 (6th Cir. 1999)(a race discrimination case under Title VII). Rather, the working conditions must be such that a reasonable person would have felt compelled to resign. *Berkman, supra, citing Mosely v. Carolina Power & Light Co.*, Case No. 94-ERA-23 (1996). In some Circuits, a complainant must prove that the employer deliberately created working conditions that were so difficult that a reasonable person in the employee's shoes would have felt compelled to resign. *Berkman, supra, citing Stetson*, 995 F.2d 355 (2d Cir. 1993)(under Age Discrimination Act). This is the "subjective" standard followed by the ARB. *Berkman, supra*. In cases where an employer presents reasonable alternatives, accommodation and acts on the subject matter of the employee's complaints, constructive discharge is unlikely. *Berkman, supra, citing Spence*, 995 F.2d 1147 (2d Cir. 1993).

Hostile Work Environment

Since the complainant has asserted the Respondent (Von Roll) had created a "hostile work environment", and the creation of such a hostile work environment is considered an "adverse employment action", I reiterate the elements of proof necessary to establish the same:

> A. The employee engaged in a protected activity and suffered intentional discrimination as a result;
> B. The retaliation was pervasive and regular (such as to alter the conditions of employment and create an abusive working environment);
> C. The retaliation detrimentally affected the employee;
> D. The retaliation would have detrimentally affected other reasonable whistleblowers in that position; and,
> E. The existence of *respondeat superior* liability. That is, was the conduct by other employees complained of permitted (actually or constructively), propagated, sanctioned or condoned by management? Did the employer respond adequately and effectively to negate such actions?

See *Varnadore*, 92-CAA-2 & 5; 93-CAA-1; 94-CAA-2); *Meritor Savings Bank, F.S.B. v. Vinson,* 477 U.S. 57 (1986); *West v. Philadelphia Electric Co.*, 45 F.3d 744 (3d Cir. 1995); *Berkman v.*

U.S. Coast Guard Academy, ARB No. 980056, ALJ No. 1997-CAA-2 (Feb. 29, 2000); and, *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). In *English v. General Electric Company*, 858 F.2d 957 (1988), the court of appeals relied upon *Meritor* in concluding that the hostile work environment theory applied to ERA whistleblower cases.

Failing to Hire

Since the complainant has asserted the Respondent (Heritage) discriminated against her by failing to hire her, I reiterate the elements she must establish:[22]

> A. That she applied for and was qualified for a job for which Heritage was seeking applicants;
> B. That despite her qualifications, she was rejected; and,
> C. That after her rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications or hired any similarly qualified person. (*Samodurov v. General Physics Corp*., 89-ERA-20 (Sec'y Nov. 16, 1993).

DISCUSSION OF FACT AND CONCLUSIONS OF LAW

Generally

As a colleague recently pointed out, like most cases of discrimination or retaliation, the instant case lacks a "smoking gun." *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989). The complainant need not have any specific knowledge that the respondent's officials had an intent to discriminate against the complainant, however ERA employee protection cases may be based on circumstantial evidence of discriminatory intent. *See Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)(quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)).

In *Timmons v. Mattingly Testing Services*, 95- ERA-40 (ARB June 21, 1996), the Board reviewed principles governing the evaluation of evidence of retaliatory intent in ERA whistleblower cases. The Board indicated that where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mind set of the employer and its agents regarding the protected activity and the adverse action taken. The Board noted that there will seldom be "eyewitness" testimony concerning an employer's mental process. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5. The Board continued:

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[22] In *Hasan v. Commonwealth Edison Co.*, ARB No. 00-028, ALJ No. 2000-ERA-1 (ARB Dec. 29, 2000).

> Antagonism toward activity that is protected under the ERA may manifest itself in many ways, e.g., ridicule, openly hostile actions or threatening statements.... When disciplinary action, including termination from employment, is involved, the past practice of the employer in similar situations is relevant to determining whether there has been disparate treatment, which may provide highly probative evidence of retaliatory intent.
>
> Furthermore, a complete understanding of the testimony of the witnesses, including testimony regarding technical procedures, is necessary for the drawing of pertinent inferences and the resolution of conflicts in that testimony.

Id. at 5-7 (citations omitted).

I find here, based on the discussion of the matters set forth below, that the complainant established a prima facie case, that the employers rebutted portions of it with what appeared, at least superficially, legitimate reasons, that Ms. Trueblood had the burden of proving her case and that for most of the allegations she has succeeded in doing so.

The germane facts of this case are straightforward. Ms. Trueblood was knowledgeable and experienced in dealing with environmental regulations. (TR 1084). Her performance ratings for all of 2000 and 2001 were "good", "satisfactory", or "fully meets expectations." (VRAX 3, 4, 8, 10). I conclude her immediate supervisor, Ms. Kuhn, and some co-workers perceived her as a "know-it-all." For example, she would leave notes about what needed to be fixed with her supervisor, which were sometimes accurate; sometimes not. (TR 2359). According to Ms. Knowles, Kuhn's supervisor, it never appeared Trueblood and Kuhn got along well at all because although Kuhn is a good worker she has a very direct style managing people and that would effect Ms. Trueblood. Ms. Kuhn once was disciplined for a "major offense" (sampling drums without vapor recovery) based on an allegation by Ms. Trueblood which Ms. Kuhn continued to deny. (TR 2351-53). Ms. Trueblood made "remarks" to other supervisors. (TR 2359). At one point, Ms. Trueblood followed VRA's suggestion that she transfer out of Ms. Kuhn's section because they did not get along. (TR 355-7). Ms. Yanni, whom I found very credible, testified that other employees did not want to work for Ms. Kuhn because they do not like or trust her. (TR 787). Moreover, Ms. Yanni has heard Ms. Kuhn say she did not like Ms. Trueblood. (TR 787, 877).

Trueblood was more "argumentative" than any other drum crew member. (TR 2357). While her inflated self-view and attempts to "walk-the-line" were well-intended, she was not a "team player." Generally, doing the right thing, as she perceived it, was more important to her than following company policies. When the company did not act in the manner she felt was right, she reported their actions to the EPA. Perhaps she derived a great deal of satisfaction and confirmation from doing so. While Ms. Kuhn reported Trueblood made many manifest mistakes, her most recent supervisor, Mr. Roach, testified she was helpful, knew her job and did not make any more or less mistakes than other drum crew members. (TR 1948-9). Mr. Roach was not consulted prior to her discharge. (TR 1948).

Eventually, her behavior caught up with her. After Ms. Trueblood communicated with the OEPA, during their inspection of VRA, on or about February 27, 2002, a rumor developed. The rumor was true; she had communicated with the EPA. Although VRA averred it encourages its employees to communicate with the EPA, its policy was firm that employees should first run compliance issues through management before communicating them to outside agencies. It appears until Ms. Trueblood acted, that employees had generally done so, at least in VRA's knowledge. On March 1, 2002, Mr. Cuppett, VRA's environmental Manager, reported the rumor to Mr. Sigg, the Plant Manager. The latter consulted with counsel and Dr. Zaengerle, the President of VRA and HES, over the company's proposed response. Mr. Sigg decided to meet with Trueblood and provide her a letter.

While Mr. Sigg may have intended the March 11, 2002 meeting in his office not be considered a "disciplinary" matter, Ms. Trueblood had an all together different impression. She had never been called into the Plant Manager's office before, she was not informed of the purpose of the meeting ahead of time, and she was clearly intimidated. An Ohio employer may fire an employee such as Ms. Trueblood at will. The meeting was intimidating and to an objective person would appear to be designed to be intimidating. Mr. Sigg not only wanted to know the substance of what she had told the OEPA, but must have known the manner in which Ms. Trueblood was approached would be intimidating. "Discipline" is not only "punishment," it can be an exercise or instruction which is designed to train proper conduct or action. That is exactly what occurred here.

While Mr. Sigg's March 11, 2002, letter refers to "health and safety" matters communicated to the OEPA, and while Mr. Sigg may have referred to it in those terms, the meeting was, without doubt, to ferret out environmental compliance issues she had raised. (TR 274-5). While Mr. Sigg might have had a non-malevolent and legitimate business motive, he did not act in compliance with environmental whistleblower laws, either at this meeting or in his subsequent conduct. He testified that this "first report to management" policy had been in effect since he took charge of VRA. (TR 284-5). He had instructed his managers to so inform the employees. (TR 285). VRA's stated objective is to operate with zero notices of violations. (TR 368). Moreover, his boss, Dr. Zaengerly had given him his marching orders to defend VRA's rights.

While VRA managed to get Ms. Trueblood to adhere to her story, on cross-examination, that only "health and safety" matters were addressed and that determined her hyper-technical response to Mr. Sigg, there is no doubt that both she and Mr. Sigg knew this matter concerned environmental compliance. Further, Ms. Knowles testified that Sigg told Trueblood to come to management with compliance issues. While, it is lamentable that Ms. Trueblood may have consistently lied about her view of the meeting, probably to protect herself, it will not bar relief.

Mr. Sigg's actions had a devastating psychological and physiological effect on Ms. Trueblood, who then suffered from anxiety and stress, required taking sick leave and eventually needed a short-term disability absence with full pay. Her work environment became "hostile."

VRA was very careful outwardly in attempting to appear to follow its rules and Employee Handbook policies, but it is abundantly evident that most of its actions were motivated by its desire to eventually discharge Ms. Trueblood. For example, while some form of minor discipline for improper use of the utility knife may have been appropriate, it was substantially motivated by her whistleblowing activities. However, for Ms. Trueblood the die had been cast. Ms. Natali, OEPA, testified that VRA's actions may affect her work at VRA. (TR 1103-4).

While Complainant's counsel has set forth a plethora of perceived discriminatory acts, some are clearly benign. The unproven or benign actions include: prohibiting her from working overtime; failing to notify her of training opportunities while on STD (she was allowed and did attend training)(TR 1593); failing to offer her early release during a work lull, on or about May 22, 2002; modifying its STD plan; and initially requiring her to submit a release from Gateway drug rehabilitation prior to returning to work (the purely bureaucratic requirement was not enforced and dropped when she dropped out of the program). However, the remainder of VRA's actions reveal a retaliatory animus and constitute unlawful discrimination.

At trial, HES attempted to shield itself from liability by presenting a mountain of evidence showing the VRA and HES were separate entities which acted independently in this matter. VRA tried to establish Mr. Sigg was the final decision-maker at VRA. It repeatedly referred to him as the "conceded decision maker." Both respondents focused on Plant Manager and lower level employee communications to prove a lack of collusion. However, these efforts fail. As President of both VRA and HES, I conclude that Dr. Zaengerle effectively pulled the strings. Moreover, Mr. Sigg was quite aware he had to follow the former's directions. (TR 473).

It was not unusual for Dr. Zaengerle to be involved in lower level personnel changes, i.e., he was responsible for Ms. Yanni's involuntary job transfer. (TR 663). Ms. Yanni was Ms. Biscella's HR assistant for six years. (TR 781). When her fiancé, Mr. Cox, a former 10-year VRA manager, was fired, ostensibly for leaving work without permission, she was suddenly and involuntarily transferred out of HR to a position not having access to personnel matters. (TR 783-5). VRA had been aware of their relationship over the past five years. Cox had coincidentally testified in a fellow employee's (Lester Roach) racial discrimination complaint proceedings against VRA prior to his termination. Now, Ms. Yanni feels like an "outcast" at the VRA administration building. (TR 786). VRA's fairly new Environmental Manager, David Cuppett, testified, in connection with Terry Lancaster's termination, that, "[A]ny discharge requires the discussion and approval from the two vice presidents, which are Fred Sigg and Heidi Duggan, and the President, which is Rudolph Zaengerle." (TR 1014). In fact, Dr. Zaengerle testified he is primarily responsible for VRA HR matters, but mostly delegated that function.

Dr. Zaengerle was the *de facto* final decision maker with respect to Ms. Trueblood's matter. He knew of the rumor(s) concerning Ms. Trueblood's communications with the EPA, on or about March 1st, the date Mr. Sigg was informed. Given his approval authority, he had to have known of HES' CSR job posting of February 28, 2002. He clearly knew of Ms. Trueblood's protected activities and approved VRA's actions. Then, <u>after</u> Ms. Trueblood had filed her formal complaints (April 9, 2002) and applied for the HES CSR position, it was Dr. Zaengerle who

decided to freeze hiring for the position. Mr. Sigg admitted speaking to Dr. Zaengerle about Trueblood's HES job application. I find representing that this was a legitimate company-wide freeze disingenuous. Ms. Moore testified that this freeze applied only to the CSR position and an assistant to her who was later hired. She knew of no other position to which the freeze applied! The so-called freeze only lasted from one day after Trueblood filed her first complaint until sometime in August 2002. Subsequently, Dr. Zaengerle added the requirement for a college degree to the position which ensured Ms. Trueblood would not be qualified for it. Adding to the disingenuousness of this ruse was Ms. Moore's November 19 testimony that a degree was merely "preferred" versus Dr. Zaengerle's August deposition testimony that he had made it a requirement.

I observe that all of this occurred within an eight month time frame, February 27, 2002 (Trueblood's contact with the EPA) through October 25, 2002 (her termination date). Although VRA's actions granting Ms. Trueblood STD and paid leaves of absence for the hearings were admirable that fact does not overcome the shortcomings of their other actions. Moreover, she was terminated while the hearings into her complaints were in progress. I find it quite noteworthy that Terry Lancaster, who had complained to the EPA in December 2001, was discharged for supposed legitimate reasons on July 27, 2002.

Mr. Sigg, VRA's Vice President and General Manager, who reported to Dr. Zaengerle, sat through 99 percent of the hearing as VRA's company representative. He also testified extensively. I observed that most VRA employees appeared to be visibly uncomfortable testifying in his presence. However, Ms. Yanni, whom I find was in a position to know, candidly testified that "[T]he consensus in the plant is that you don't say anything or something will happen." (TR 788, 794). She added that employees who speak up get in trouble and gave examples. (TR 795-6). Mr. Cox and Mr. Lancaster shared this opinion. (TR 1314).

Several VRA employees, Mr. Sigg, and in particular, Ms. Knowles and Ms. Biscella, had frequent memory lapses during their direct-examination by complainant's counsel. Mr. Cuppett, the Environmental Manager for only the past year could not remember which environmental compliance reports he signed. Additionally, he could not remember whether his tip-off to Mr. Sigg earlier in 2002 concerning the rumors about Trueblood communicating with the OEPA referred to the substance of those contacts nor could he remember one person from whom he had heard the rumor. (TR 922-25). Nor, while testifying, could he remember whether his input was solicited when he was shown Trueblood's April OSHA complaint by Biscella, until shown his contradictory deposition testimony, or what that input might have been. (TR 936-7). At one point he testified he had not mentioned Trueblood's mode of communication with the OEPA, but later testified he had. (TR 271). Mr. Sigg testified Cuppett had "mentioned" several people from whom he had heard the rumor. (TR 266). Sigg, after extensive questioning, testified Cuppett mentioned Trueblood had e-mailed the OEPA. Finally, at his deposition Mr. Cuppett testified VRA had received three to four notices of violations whereas, at the hearing, he admitted to five or six. Thus, I give his testimony in support of VRA little, if any, weight.

Ms. Knowles testified she could not remember whether her subordinate, Ms. Kuhn, had been disciplined for failing to use a vapor recovery system properly, when she had. (TR 596). Ms. Knowles' trial testimony also varied from her earlier deposition testimony. For example, at her deposition she testified that VRA "requires" employees to go to their supervisors with compliance issues, whereas, at trial she testified VRA "encourages" them to do so. (TR 511). I find the testimony from Messrs. Cox, Rose and Ms. Trueblood, concerning the May 17, 2002 absence, set forth above, more credible than Ms. Knowles' testimony. Complainant's questioning of Ms. Knowles herself revealed the contradictory nature of her testimony. For instance, she denied Trueblood, who knew she was low on absence days, had requested a vacation day. Yet, Knowles admitted employees requesting sick leave need not speak with a manager or arrange "coverage." This absence was used as a basis for disciplinary action. Additionally, she testified Ms. Trueblood's work was below average, while her performance reports, which Ms. Knowles approved, reflected satisfactory work. (TR 560). She testified Ms. Kuhn, her subordinate, was a safe worker when the evidence demonstrated she had had a number of injury accidents and been disciplined for not wearing proper protective gear. (TR 595). In addition to her forgetfulness, I find she attempted to make VRA look good in her testimony and Ms. Trueblood look bad. Thus, I give her testimony little, if any, weight.

Ms. Biscella, VRA's HR Manager, was sometimes evasive and had frequent memory lapses, such as when she was asked about her discussions with Dr. Zaengerle related to Ms. Yanni's job transfer. (TR 663-4). Ms. Yanni had been her only long-term assistant. Nor, on examination by complainant's counsel, could Ms. Biscella, VRA's HR Manager, say whether management had any input into the MERIT committee decisions. (TR 676). Yet, the Employee Handbook, Policy 502, states that any disciplinary matters must be discussed with her before corrective action is taken. Then on examination by VRA's counsel, she admitted management had an input into the decision. (TR 718). When asked by complainant's counsel if she had discussed any testimony in the case with Mr. Cuppett, she testified, "I don't recall." (TR 758). Thus, I give her testimony little, if any, weight. Ms. Kuhn's testimony comparing Ms. Trueblood's mistakes, i.e., on manifests, hardly squares with the overall "satisfactory" and "meets expectations" ratings she gave her. Moreover, Ms. Kuhn admitted her bias toward Ms. Trueblood, i.e., their relationship had "gone downhill." Thus, I give less weight to her testimony. I do find Ms. Yanni quite credible notwithstanding her anger over Mr. Cox's firing and her own transfer. (TR 861).

Mr. Sigg appears to be bright and extremely focused on VRA's success, which is not inappropriate. (See, e.g., Cox's testimony about Sigg's centralization of management authority and Lancaster's testimony-TR 1292-1293). However, he too was unusually "forgetful" for a man of his ability. His testimony was, in essence, that VRA followed its policies to the letter and even-handedly. I do not find the facts substantiate that. For example, the HR Manager, Ms. Biscella's testimony showed times when VRA strictly adhered to its Employee Handbook policies and then other times when managers had the discretion to deviate from it, i.e., with respect to various policies on managers granting vacation and failure to follow the policy regarding mandatory use of the disciplinary committee for certain "confidential" type terminations. (TR 742, 750). Another

example is the suspect procedure in which Kuhn, a repeated safety violator, was promoted to her supervisory position over other, perhaps better qualified applicants. (TR 790-1). Moreover, Ms. Yanni, formerly of the HR department, testified that "VRA is not very consistent about following its own policies." Mr. Lancaster, a former employee, testified that VRA's disciplinary policy is used "selectively, depending on who you are and depending on what they want or what they think of you." (TR 1312). For example, Ms. Kuhn was not disciplined for a forklift accident involving personal injury whereas Ms. Trueblood was for a forklift accident involving only property damage. (TR 2350). Nor does Ms. Kuhn's level of discipline appear to be consistent with VRA's disciplinary policy 502; it appears that she, unlike Ms. Trueblood, was given a great deal more latitude than the policy calls for. (See also VRAX 30). Moreover, in addition to Ms. Trueblood, only one VRA employee had a permanent major offenses in his record for misusing a utility knife in an electrical control button and the remaining employees who had done so were only verbally reminded it was wrong.

Some of Mr. Sigg's testimony is contradicted by other facts. For instance, in his statement to the OEPA he referred to the HES 10-day facility as a subject of Trueblood's communication to the OEPA, yet he testified that he had no knowledge of what she had communicated. (TR 274; 352). Sigg mentioned e-mail correspondence to the OEPA and said the rumor was his only source. While, in April, he told the OEPA he did not know of the mode of Trueblood's communications, and CX 1 refers to e-mails, he testified he could not recall if there may have been multiple modes. (TR 1509). Another example concerns VRA's and Sigg's representations that the employee e-mails could not be accessed. Ms. Yanni, whom I find very credible, testified that Ms. McKnight, who worked in the computer section had informed her otherwise. (TR 786). Finally, while Sigg testified he spoke with less than ten managers about whether or not Trueblood had mentioned compliance issues to them, he testified he could not remember who they were. (TR 269). Had he spoken to the Safety manager, Mr. Rose, he would have learned Ms. Trueblood had raised many issues with him. When asked if he had spoken with Dr. Zaengerle about Trueblood's termination before the latter was told, he testified, "I don't recall." (TR 1914). However, David Cuppett, testified that, "[A]ny discharge requires the discussion and approval from the two vice presidents, which are Fred Sigg and Heidi Duggan, and the President, which is Rudolph Zaengerle." (TR 1014). Thus, Mr. Sigg's memory lapse conflicts with VRA's normal procedure. When asked who served on VRA's board, he testified, "I am not exactly certain.." (TR 247). Yet, when a board member's name was presented to him he knew much about him. (TR 247-8). When initially asked if he had informed Ms. Knowles of the purpose of the March 11 meeting he denied it. Then, when shown his deposition, which said he had, he admitted he had. (TR 291). During his September 11 testimony he said he could not remember the results of a VRA investigation into acceptance of bromoform and benzine, only two weeks earlier. (TR 322). When asked if VRA had consulted legal counsel with respect to the Disciplinary Committee's recommendation related to the utility knife incident, he responded: "I'm not certain. I do not recall. It's possible that I was aware of that, or, and I'm not even sure we sought legal counsel, but I'm not certain." (TR 490). That type of elusive testimony typified much of his testimony. When shown CX 24, an e-mail reflecting counsel had been utilized, Mr. Sigg agreed. (TR 491). When asked if Dr. Zaengerle had made the decision to rotate Yanni,

Montgomery and Dotson, VRA employees, he responded, " That decision was made among various people. I'm not sure who actually finally made the decision. It was probably mine." Again, the answer appeared evasive. His testimony that he was unsure if HES Environmental Services, LLC, was merely a holding company and that he was not certain whether or not HES had loaned money to VRA in the past few years strains credulity. (TR 470, 476). Thus, for the reasons stated and his narrow focus on the business which I find colored his testimony, I give Mr. Sigg's testimony lesser credence.

I also give somewhat lesser weight to the testimony of the generally well-regarded Mr. Avdellas of HES. He too appeared visibly uncomfortable testifying in Mr. Sigg's presence. Moreover, when questioned about his pre-interview conversations with Ms. Biscella (VRA), his testimony omitted a matter Ms. Biscella had said occurred. (TR 1448).

Thus, I will find both VRA and HES (but not as a "joint enterprise") jointly violated the whistleblower provisions of the applicable environmental acts. Ms. Trueblood is entitled to damages. While reinstatement may be a permissible remedy, and I give Ms. Trueblood that option, it would be a tremendous mistake on her part to return to VRA. She does not fit in their culture and there is clear animus toward her. Thus, I encourage VRA and Ms. Trueblood to reach some accommodation on this issue.

Jurisdiction

The parties stipulated that they are "employers" of the complainant employee, Ms. Trueblood.

VRA and HES are unquestionably subject to the jurisdiction under the Solid Waste Disposal Act, 42 U.S.C. § 6971(a), which governs whistleblower actions against employers engaged in the treatment, storage, transportation, and disposal of hazardous waste. *Williams v. TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992). The evidence indisputably establishes they each engaged in one or more of such activities. Mr. Sigg testified VRA has a state permit from the Hazardous Waste Facility Board. (TR 423). Moreover, VRA, by virtue of its federal permit, is expressly subject to the Resource Conservation and Recovery Act which is part of the Solid Waste Disposal Act.

Mr. Sigg testified that VRA has Ohio permits, under the Clean Air Act and a water discharge permit issued by the OEPA. (TR 423). Mr. Cuppett, VRA's Environmental Manager, testified that VRA has 38 air permits from OEPA, storm water discharge permits, a PDS permit, a HWFAB permit, and a RCRA permit from the US. (TR 980-981). Moreover, he admitted an acid waste discharge into a navigable river, the Ohio River. (TR 984, 1321). Lancaster testified that there are municipalities which draw drinking water from Ohio River within one mile of VRA ... (TR 1417). Ms. Natali testified VRA holds a National Pollution Discharge Elimination System ("NPDES") permit and various air permits. (TR 1075). Moreover, Ms. Natali identified CX 44

and 50, VRA's Part-A and B Permit application which identifies the multitude of regulations by which VRA is governed. (CX 44; TR 1104, 1123). Although not "permitted" directly by the US EPA, the existence of the State permits establishes that VRA engages in activities governed by the CAA and CWA, i.e., the Water Pollution Control Act (WPCA"). Moreover, VRA had received a significant non-compliance letter from the US EPA, showing its jurisdiction over VRA. (CX 17). Mr. Cox and Ms. Natali testified the CAA applied to VRA, the former saying, "[W]hat goes through the incinerator and not burned is released into air. ... emissions.." Moreover, he testified that VRA discharges waste water into the adjoining river.

An operator is under CERCLA's coverage if : there is a release or threatened release of a hazardous substance; at a facility; and, the operator is the responsible party. *United States v. Aceto Agriculture Chem. Corp*., 872 F.2d 1373 (8th Cir. 1989). Here, there were both threatened and actual releases of hazardous substances.

Moreover, under the Administrative Law Judge's rationale in *Proud v. CECOS International*, 1983-TSC-1 (ALJ Sept. 30, 1983), I find the subject matter covered by the Toxic Substances Control Act. The testimony in this matter establishes that VRA has and may handle Benzene, which is governed by the Act. Federal Register: Oct. 5, 2002 (Vol. 66, No. 66, page 194).

I also find the ERA applies. While Ms. Trueblood testified she had no knowledge whether VRA accepted any waste with radiation levels subject to NRC oversight, she added that VRA tests materials for radiation. (TR 2090, 2094). Mr. Sigg admitted that VRA does scan the waste VRA receives for radiation and occasionally some waste has levels of radiation. (TR 350). Mr. Cuppett, VRA's Environmental Manager, testified that VRA rejects any radioactive material above background, via an instrument, and he believed the NRC sets those limits. (TR 981).

The complainant avers, " [T]his is a case where the employer identified the whistleblower (CX 1), but could not identify the subject matter of Trueblood's reports to the US and Ohio EPAs. As such, it is appropriate that Trueblood is protected by all seven of the federal environmental laws enforced through 29 C.F.R. Part 24." (Brief at 32). I accept the complainant's argument that all seven environmental acts are applicable under the *Jayco* holding. As in *Jayco*, the parties have engaged in activities in furtherance of the objectives of all the statutes of the complaint.

As in *Sasse*, *supra*, it appears the respondents have "confused the Labor Department's subject matter jurisdiction over an environmental whistleblower complaint . ." with the wholly separate question whether they fall within the jurisdiction of the EPA with respect to the subject matter of the Acts.

Protected Activities

VRA's Safety Chief, Larry Rose, testified that Trueblood raised compliance issues in good faith.[23] (TR 2414). CX 1, the March 11, 2002, letter from Mr. Sigg to Ms. Trueblood directly sets forth the former's belief that Ms. Trueblood had communicated with the OEPA. Ms. Trueblood's and Ms. Natali's testimony explicitly establishes that she had not only communicated with the OEPA, but the US EPA concerning environmental matters at VRA and HES. Moreover, the fact that two OEPA inspectors are stationed at VRA and they are free to communicate with the employees is proven. (TR 1103).

Ms. Trueblood had also filed environmental whistleblower complaints directly against VRA and HES, and had helped another employee do so, all of which constituted protected activities. Coverage under the "participation" clauses of the environmental whistleblower statutes "does not turn on the substance of an employee's testimony," and retaliatory actions are proscribed "regardless of how unreasonable" an employer finds the testimony. *Kubicko v. Ogden Logistics Services*, 181 F.3d 544 (4th Cir. 1999); *U.S. v. Glover*, 170 F.3d 411 (4th Cir. 1999).

Finally, it is not contested that Ms. Trueblood frequently made internal complaints and met with representatives of the US and OEPA. She refused to follow VRA's instructions on completion of manifests. She brought manifest errors to the attention of her superiors and management. Most recently, she complained to Ms. Natali about a HES truck which was not "RCRA-empty." Two days later she was fired.

Respondents' Awareness of Protected Activities

CX 1, the March 11, 2002, letter from Mr. Sigg, the Vice President and Plant Manager of VRA, to Ms. Trueblood directly sets forth the former's belief that Ms. Trueblood had communicated with the OEPA. It is also clear that Dr. Zaengerle, President of HES, LLC, and President of VRA, was aware of Ms. Trueblood's complaint(s) and protected activities. Mr. Sigg called and informed him before meeting with Trueblood. Dr. Zaengerle was informed by HES HR, Tonya Mohr, that Ms. Trueblood had filed a complaint against HES as well. (Zaengerle Dep. 13). The respondents knew Ms. Trueblood had filed a series of environmental whistleblower complaints against VRA and HES, beginning on April 9, 2002. Ms. Biscella, VRA's HR Manager, knew of Sigg's March 11 letter and its substance dealing with communications to the OEPA. (See CX 3). I find it highly unlikely, given Mr. Avdellas' former employment with VRA and association with Dr. Zaengerle, that HES was unaware of Ms.

[23] An employee's motive in making the underlying charge is immaterial. Even if an employee made a charge to protect her job, the charge itself must be judged on whether it was made in good faith. *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000).

Trueblood's rumored communications to the OEPA and the March 11, 2002 meeting, at a time close to that meeting.

Unfavorable Personnel Actions

Donna L. Trueblood has alleged the following retaliation for her protected activities:

(1) on or about March 11, 2002, VRA subjected her to a hostile work environment and hostile interrogations;

(2) on or about March 11, 2002, VRA subjected her to a constructive temporary layoff;

(3) VRA restrained her and other employees from engaging in protected activities;

(4) VRA and HES prohibited her from applying for promotions and transfers, or retaliated against her for protected activity by not permitting her to interview for a customer service representative ("CSR") position with HES.

(5) prohibiting her from working overtime;

(6) failing to notify her of training opportunities while she was on leave;

(7) subjecting her to close supervision;

(8) notifying her that she would be recommended for a "minor offense" for excessive absenteeism and docking her pay on May 17, 2002;

(10) failing to offer her early release during a work lull, on or about May 22, 2002;

(11) issuing a "major offense" on May 31, 2002;

(12) on June 3, 2002, suspending her for a week without pay and good cause.

(13) giving notice, on June 24, 2002, of its intent to eliminate its short-term disability program;

(14) on July 11, 2002, requiring her to provide a releases from Gateway drug rehabilitation program.

(15) VRA retaliated against her because of her protected activity by discharging her on

October 25, 2002.

As discussed in more detail below, and considering my earlier discussion, I find she has established: (1), (3), (4), (7), (8), (11), (12), and (15).

Protected Activities as Contributing Factors in Unfavorable Personnel Actions

CX 1, the March 11, 2002, letter from Sigg to Trueblood is an unfavorable personnel action directly resulting from Ms. Trueblood's protected activities, i.e., communications with the OEPA. Sigg testified that Trueblood's protected activity led to his loss of trust in her.[24] (TR 301). While he did not consider the letter or the meeting to involve discipline, he believed Ms. Trueblood had breached VRA's unwritten policy of first communicating such matters to management. (TR 301). He eventually fired her. In order to constitute an "unfavorable personnel action", an action need not rise to the level of discipline. However, the effect of the March 11 meeting and letter were "disciplinary".

Allison Knowles, a VRA second-tier supervisor, testified that five service technicians were glad to see Trueblood fired because, "they were tired of listening to Donna, and a lot of them did not care for Donna's worth [*sic*, should be "work"] ethics and to work next to her. (TR 2444-5).

When asked if he knew how management at VRA normally responded when they think an employee has spoken against them, Terry Lancaster testified: "Angrily... (I know) because I've seen Fred (Sigg), as I would call it, throw a temper tantrum.. . (about) Because somebody either said something or did something that he didn't think was appropriate for the EPA to find out." (TR 1302-03). Lancaster testified, "they will lie to protect the company." (TR 1314).

Pat Natali, the on-site OEPA inspector, testified that VRA's response was "surprising" and "out-of-the-ordinary." As discussed more fully above, I find Ms. Trueblood's protected activities, i.e., cooperation and communication with the EPAs, without first going to management, formed the basis for greater scrutiny of her work and behavior and resulted in her being treated differently from other employees.

Respondents' Clear and Convincing Evidence of Legitimate Motives or Protective Activities not Bases of Action

Asserted legitimate, nondiscriminatory reasons for taking adverse action against an employee that are the manifestations of a failure to observe channels (which is protected activity)

[24] As complainant's counsel points out, this testimony seriously undermines VRA's burden of showing they would have discharged her absent the protected activity. (Brief at 46, n. 27).

do not establish a respondent's burden of articulation. Thus, in *West v. Systems Applications International*, 94-CAA-15 (Sec'y Apr. 19, 1995), the Secretary rejected as legitimate reasons the Complainant's lack of direct communication with management, and "low company morale" resulting from the Complainant's communication with a emissions coordinator from the company from which the respondent had contracted to provide emissions monitoring.

Under the whistleblower protection provisions of the ERA and similar laws, an employee may not be disciplined for failing to observe an established chain of command when making safety complaints. *Fabricius v. Town of Braintree/Park Dept.*, 1997-CAA-14 at 4 (ARB Feb. 9, 1999). However, an employer may develop arbitrary, ridiculous and even irrational policies as long as they are applied in a nondiscriminatory manner. *See Smith v. Monsanto Chem. Co.*, 770 F.2d 719, 723 n.3 (8th Cir. 1985) *cert. denied*, 475 U.S. 1050 (1986)(a case arising under Title VII of Civil Rights Act of 1964). That is not the case here. Ms. Trueblood was singled out for her non-adherence to the management first policy.

In *Timmons v. Franklin Electric Coop.*, 1997-SWD-2 (ARB Dec. 1, 1998), the Board observed that an employer's expectation that an employee interact with others in the company as a "team player" does not constitute a proscribed criterion *per se. See Odom v. Anchor Lithkemko/ International Paper*, ARB No. 96-189, ALJ Case No. 96-WPC-0001, Oct. 10, 1997, slip op. at 12; *Erb v. Schofield Mgmt.*, ARB No. 96-056, ALJ Case No. 95-CAA-1, Sept. 12, 1996, slip op. at 2-3. Nonetheless, the extension of that expectation to a point where it interferes with protected activity, as here, is prohibited. No further discussion is necessary regarding the unlawfulness of VRA's "report first to management" policy with respect to environmental complaints. It is unlawful. See, *Mandragar*.

The unproven or benign actions for which legitimate motives were both established and not appropriately proven otherwise, include: prohibiting Ms. Trueblood from working overtime (the side effects of the medications warranted a doctor's note); failing to notify her of training opportunities while on STD (she was allowed and did attend training)(TR 1593); failing to offer her early release during a work lull, on or about May 22, 2002 (this was discretionary and legitimately denied); VRA modifying its STD plan; and initially requiring her to submit a release from Gateway drug rehabilitation prior to returning to work.

In June 2002, VRA eliminated its self-funded STD plan to save costs and improve efficiency and purchased a STD plan administered by a third party administrator. VRA grand-fathered Ms. Trueblood and several others under its earlier plan so they would not lose benefits as a result of the change. Thus, VRA has established a legitimate basis for this which Ms. Trueblood has not appropriately refuted. However, as discussed in greater detail above, VRA's effort to show in most, if not all, instances that it was merely following established policies, e.g., in the Employee Handbook, have not only failed, but the complainant has proven otherwise. As pointed

out above, VRA neither applied its policies or discipline in an even-handed, non-discriminatory manner.

Moreover, it is established that Dr. Zaengerle's involvement in the matter interfered with Trueblood's opportunity to apply for the HES CSR position.

Complainants' Burden the Respondent's Legitimate Reasons a Pretext

VRA disciplined Ms. Trueblood for exceeding her 56 hours of absence time. Had she not been "docked" absence time for her, May 17, 2002, leave she would not have exceeded the limit. Ms. Kuhn, her supervisor, arbitrarily and after the fact converted the vacation time to absence time for that day. (TR 2321). The absence time was not paid. Mr. Roach, Trueblood's most recent supervisor testified he, like Ms. Trueblood, thought that unpaid personal time was not counted against absence time. (TR 1956). Moreover, service technicians who were out of sick time, or for whom vacation time was not available, who persuaded other technicians to cover for them usually would merely trade days without taking any absence time. (TR 1956, 1958-9, 1871). This was done with short notice. (TR 1959). Ms. Kuhn testified that "as long as I've worked there, is when you turn in vacation, you turn it in 10 days in advance. (TR 2318). Later, she testified her policy required seven days advance notice. When asked if anyone she supervised (drum crew) had ever turned in a vacation request with less than seven days notice, she could not recall. (TR 2319). Ms. Trueblood had not used the "call-in" line normally used for sick leave and had arranged for another employee to cover her absence, which employees seeking vacation time usually did.

The Preface to VRA's Employee Handbook, which is designed to "communicate the general terms and conditions of employment, benefits, and procedures" of VRA, specifies that "[A]ll additions, deletions, or changes to the Employee Handbook are to be made by the Human Resources Department." No VRA written policy requires seven or ten days advance notice for a vacation request. In fact, Policy 230 states one may request vacation time in lieu of counting time toward the attendance policy. (VRAX 1). Although the choice of approving "absence time" versus "vacation" time is in the manager's discretion, Ms. Kuhn testified she was not aware of how many absence days Ms. Trueblood had accumulated at the time. Thus, changing Ms. Trueblood's permissible request for vacation set her up for an eventual violation of the absence policy. Most significantly, VRA has never fired anyone other than Ms. Trueblood for use of personal absence time. (TR 1948). Moreover, VRA's Attendance Policy, No. 230, states, "The intent is not to discipline an employee for medical situations beyond the control of the employee" as was Ms. Trueblood's the situation for her absence in the Fall of 2002.

Although viewed in isolation, one might conclude VRA was justified in giving Ms. Trueblood a major offense for inserting her utility knife into "fail-safe" button on the conveyor

belt line, the discipline was not in line with the discipline of her fellow employees. Two others received major offenses. Mr. Bowers, who had taught her the practice may have merited a major offense. However, it had been a common practice and those drum crew workers who did not admit having done so were verbally reminded not to do so. Moreover, the probationary employee's major offense was reduced, in part, because of his "openness and honesty." Here, both Mr. Bowers and Ms. Trueblood had been open and honest as well. Certainly, had Ms. Trueblood known it was wrong and had it not been the practice, she would not have done so in Ms. Kuhn's presence. The fact, Ms. Trueblood was allegedly the first one caught appears to be the result of Ms. Kuhn's increased scrutiny of her work. Moreover, in each of Ms. Trueblood's disciplinary actions and eventual termination, her prior record was considered.

Ms. Kuhn, Trueblood's supervisor testified that she (Kuhn) had had at least two major offenses, yet VRA gave her a pay raise and she remained employed at VRA at the time of the hearing. (TR 2369).

I reiterate the involvement of Dr. Zaengerle in nearly the entire process involving the complainant. He not only knew of the rumors of Ms. Trueblood's cooperation/communication with the EPAs, he either directed or at least approved of Mr. Sigg's approach to her situation. He approved the March 11, 2002 letter, he knew of her whistleblower complaint either the day it was filed or shortly thereafter, and it was he who announced the HES hiring freeze knowing of Trueblood's application and complaints. Dr. Zaengerle added a college degree requirement when the HES CSR job was re-advertised presumably knowing Trueblood lacked the qualification and knowing most CSRs lacked degrees. Moreover, the purported hiring freeze was not universal. Finally, although Mr. Sigg, et al, would not admit it, it is established that Dr. Zaengerle participates in termination decisions and undoubtedly did in Trueblood's.

As set forth above, I have given less weight to the testimony of the majority of VRA's and HES' witnesses for the reasons given. I credit the testimony of the complainant's witnesses, with the caveats noted herein, that VRA employees who spoke out were the ones to incur VRA's wrath. With her supervisor, Ms. Kuhn, having every motive for retribution and disliking Ms. Trueblood, coupled with her direct nature and Mr. Sigg's direct involvement in her case with Dr. Zaengerle's oversight, it is established that VRA scrutinized Ms. Trueblood's acts and slowly built up a record upon which to eventually terminate the complainant. However, Ms. Trueblood has established she was in the circumstances set forth above treated more harshly than other employees and that her protected activities formed the basis for such treatment. Ms. Trueblood's most recent supervisor was not consulted before she was fired. (TR 1948). Mr. Sigg, who had lost trust in Ms. Trueblood, testified that two minor offenses could be construed as a major and the policy is that two majors are grounds for termination, but the decision is made on an individual basis, as it was in Ms. Trueblood's case. Thus, two major offenses do not necessarily result in termination. His testimony to the effect that great efforts are made not to terminate

employees is belied by the facts.

As repeatedly iterated above, HES' actions denying Ms. Trueblood the opportunity to interview for the CSR position and the hiring-freeze were pretextual.

Hostile Work Environment

I find: Ms. Trueblood engaged in protected activities and suffered intentional discrimination as a result; the retaliation was pervasive and regular (such as to alter the conditions of employment and create an abusive working environment); the retaliation detrimentally affected her; the retaliation would have detrimentally affected other reasonable whistleblowers in that position; and, the existence of *respondeat superior* liability. That is, the conduct by other employees complained of was permitted (actually or constructively), propagated, sanctioned or condoned by management and the employer did not respond adequately and effectively to negate such actions.

As I have alluded too earlier, Ms. Trueblood was perceived as a know-it-all and trouble maker by VRA and its employees. She was not seen as a team player. Ms. Trueblood, herself, felt she knew the right or legal way to do things and was loathe to tolerate those who did not agree. Nor did she hesitate to complain or do the job her way. Nevertheless, she clearly engaged in protected activities, as described above and suffered intentional discrimination, described below, as a result. While some of VRA's actions are not shown to be discriminatory, she was placed under greater scrutiny than other employees and subject to harsher discipline for some offenses. Both her testimony and the medical testimony establish the devastating impact of this treatment. Any other reasonable whistleblower in her shoes would have been detrimentally affected. VRA's management not only knew of this discriminatory behavior, but participated in it themselves. Then, at the hearing, the respondents' employees attempted to cover it up by being conveniently forgetful and, in a number of instances described above, by straying from the truth.

Constructive Temporary Medical Leave of Absence

The fact one has established a hostile work environment is not enough by itself to prove constructive discharge and therefore establish a remedy under a theory of Constructive Temporary Medical Leave of Absence. Working conditions must be such that a reasonable person would have felt compelled to take such leave. Here, the complainant has established a hostile work environment existed. I find it was both objectively and subjectively reasonable for her, in light of her stress and diagnosed anxiety disorder, to take STD. Of course, while on STD she would have necessarily missed out on her work and any opportunity for advancement. She was fully compensated for her STD, under a non-discriminatory STD policy. However, given the tenuous nature of this theory, I do not premise my decision or the relief granted on it.

HES Failure to Hire

I reiterate the elements the complainant must establish and discuss each one hereafter:

1. That she applied for and was qualified for a job for which Heritage was seeking applicants. The parties have stipulated that Ms. Trueblood applied for the position. Comparing Ms. Trueblood's resume (HESX 1) with the requirements of the CSR job opening (CX 54), I find she was qualified by virtue of her experience for the position.

2. That despite her qualifications, she was rejected. It is not contested that Ms. Trueblood had applied, was not interviewed and not accepted for the position.

3. That after her rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications or hired any similarly qualified person. It is undisputed that HES imposed a "hiring freeze" which temporarily closed the position. When the CSR position was later reopened, it contained a requirement for a college degree which Ms. Trueblood lacked. She did not apply for the readvertised position. Some of HES' CSRs lack college degrees, but according to Dr. Zaengerle, were "grandfathered" in.

HES' counsel's observation that a complainant who cannot prove the job she sought was filled cannot make a case of "failure to hire" in violation of the environmental whistleblower laws is, in general, correct. However, this case is somewhat unique in that Dr. Zaengerle, who possessed knowledge of Trueblood's whistleblowing activities and complaints, was the President of both companies. It was he who imposed the limited hiring freeze after HES had received Trueblood's OSHA whistleblower complaint. However, Ms. Moore, HES Environmental Services LLC, was still able to hire an assistant. Although Dr. Zaengerle testified that he had legitimate business motives for imposing the freeze, I do not find that entirely credible. Given his knowledge of the "Trueblood" situation, his communications with Mr. Sigg, the VRA corporate culture which according to the values wheel encourages communication and teamwork, and, the existence of other non-degreed CSRs, I conclude Dr. Zaengerle ordered the limited freeze and the Associates Degree requirement, at least in part, to eliminate the Trueblood problem.

Thus, whether John Avdellas, the HES Manager, was told of the details of the Trueblood matter by any lower level VRA employee or by Mr. Sigg is largely irrelevant.[25] Whether Avdellas, who was visibly uncomfortable during his testimony, liked Trueblood or not, Dr. Zaengerle's actions communicated a message; a message that HES would not hire Trueblood. Likewise, all the testimony concerning the timing of the interviews for the job and whether

[25] Avdellas had seen Trueblood's OSHA complaint before Zaengerle informed him of the hiring freeze. He had forwarded the complaint to Tonya Moore, HES' HR and Safety Manager.

Trueblood could interview while on STD is so much of a red herring. Avdellas could have easily interviewed Trueblood had he wished too. The complainant has established that the hiring freeze and Associates Degree requirement for the HES CSR position were pretexts for HES' effort to preclude her from the chance to be hired for the position.

Damages

The statutes under which Complainant has claimed protection or which are implicated herein, provide for the following damages:

Clean Air Act (CAA), 42 U.S.C. §§7622(B) (1994):

If in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant.

Solid Waste Disposal Act (SWDA), 42 U.S.C.§§ 6971(b) (1994):

If [the Secretary] finds that a violation of subsection (a) did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of the employees to his former position with compensation.

Federal Water Pollution Control Act (WPCA), 33 U.S.C. §§ 1367(b) (1994):

If [the Secretary] finds that a violation of subsection (a) did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of the employees to his former position with compensation.

The CAA authorizes damages to compensate a complainant for losses regarding the terms, conditions and privileges of employment. The SWDA and WPCA also authorize damages in an amount to compensate a complainant for employment losses, but are more liberal and are not limited to compensatory damages.

In addition to compensatory damages, I find that exemplary damages are warranted in this case. The decision to award Complainant exemplary damages is based on the chilling effect caused by Respondents' illegal activity. Other personnel must be assured that they will not be singled out for similar treatment. In order to insure this result for Complainant and other personnel and to deter similar behavior by Respondents, the damages must be sufficient to have a definite financial impact on the agency. VRA reported a net worth of one hundred million dollars. HES did not report a net worth, but has a staffing level over five times that of VRA. (CX 51). It is thus necessary to address the availability of exemplary damages under the relevant Acts. The CAA is clear on its face that exemplary damages are not permitted. "[I]t is clear that Congress intended to allow 'compensatory damages,' and nothing else." *DeFord v. Secretary of Labor,* 700 F.2d 281 (6th Cir. 1983). The Court in *DeFord* addressed the Energy Reorganization Act ("ERA") whistleblower provisions, which are identical to the provisions of the CAA. As the Court stated, "[t]he statute is not ambiguous on this point." *Id.* Considering the identical wording of the ERA and the CAA, it is clear that only compensatory damages are available under the CAA. However, the phrasing of the CAA is not reproduced in the SWDA and the WPCA.

The damages provisions of the SWDA and the WPCA are identical. These statutes do not contain the same limitations as the CAA. Unlike other environmental and nuclear safety employee protection provisions, the Toxic Substances Act and the Safe Drinking Water Act explicitly permit "where appropriate" exemplary damages. 15 U.S.C. §§ 2622(b); 42 U.S.C. §§300j-9(i)(2)(B)(ii). The damages provisions of the SWDA and the WPCA do not expressly, on their faces, permit or disallow the award of exemplary damages. The statutes at issue provide that the "party committing [the violation] take such affirmative action to abate the violation" as deemed appropriate, "but [such action is] not limited to 'compensatory' damages." Therefore, I am not limited to awarding only compensatory damages to Complainant under the provisions of the SWDA and the WPCA. As such, primarily because of the deliberate nature of the retaliation, the serious chilling effect of this type of retaliation, and the respondents' witnesses' confabulation, I have determined that exemplary damages are appropriate. Complainant is therefore to be paid $125,000.00 in exemplary damages.

Dr. Walker's professional opinion that Ms. Trueblood suffered from post-traumatic stress disorder (PTSD) resulting from hostility at work was never rebutted by any expert opinion evidence. Trueblood, herself, testified at length about the devastating impact of the job situation including how she took STD and sick leave for stress/anxiety and the medications she was prescribed. (TR 1673; CX 35). Trueblood testified she often cried, felt irritable, impatient, disinterested in anything, and "disempowered," with no control over her life, suffered sleeplessness, and "could not get a grip". (TR 1673). Her friend, Leslie Woodford, a nurse (LPN), gave a "lay" opinion about her observations of the effects of the emotional distress. (TR 1222-25). Ms. Woodford testified how Ms. Trueblood had suffered anxiety or panic attacks and chest pain during the three months after the March 2002 meeting. Lancaster, who saw her

weekly, testified the matter "tore her apart." (TR 1302). Lancaster testified that she had "good days and bad ones, i.e.., curled up on couch in a ball." (TR 1388). Although, VRA's counsel's cross-examination revealed the effects were occasionally not quite as temporally debilitating as Ms. Trueblood and her friend, Ms. Woodford, related, the effects were nonetheless very serious and damaging. Ms. Trueblood admitted, on cross-examination, that she could engage in normal daily activities between March 29, 2002 through May 6, 2002. (1856-7). After a March 29, 2002 appointment with Dr. Walker-he gave her a letter (VRA 37) saying that she could participate in normal daily living activities, but not work. (TR 1854-5). Dr. Sitarik found her doing (comparatively) very well, on April 23 and May 14, 2002. (TR 1870; VRAX 40). On 6/14/02, Dr Sitarik's office visit notes indicates she was prescribed Xanax, 90 tablets. (TR 1891; VRA 58). VRAX 56 and 57 are doctors' certificates for her to be off work the following periods: 6/12-6/13 and 6/14-7/1/02. (TR1889). As late as September 16, 2002, Dr. Spahija forbade Ms. Trueblood's use of forklifts or trucks. Moreover, she was twice hospitalized under emergency conditions due to the medication she took to relieve her work-related depression and stress.

The fact that Ms. Trueblood was not allowed to interview for the HES CSR position and the purported hiring-freeze temporarily imposed shows she may have further difficulty obtaining work in the environmental field. Finally, Ms. Trueblood was terminated on October 25, 2002 and was not working at the close of the hearing. She testified that she now cries at the "drop of a hat", this case has consumed her life and that she has dropped out of her part-time college studies because she cannot concentrate.

In *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), the ARB adopted the ALJ's award of compensatory damages in the amount of $250,000. Respondent argued that the ALJ's award of compensatory damages was excessive in light of the fact that Hobby presented no expert medical or psychiatric testimony. The ARB, however, found that "[c]ompensatory damages are designed to compensate discriminates (sic) not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." Georgia Power also argued that the award was excessive in light of previous DOL whistleblower cases. The ARB noted that the award was comparatively high, but noted its decision in *Leveille v. New York Air Nat'l Guard,* ARB No. 98-079, ALJ Nos. 94-TSC-3, 4 (ARB Oct. 25, 1999), where it had held that there is no arbitrary upper limit in compensatory damages award and that damage awards in other discrimination-related statutes can be instructive (noting that in Title VII cases, awards up to $300,000 for non-pecuniary losses are allowed). The ARB summarized as follows:

> During his final days at Georgia Power, Hobby was subjected to a series of slights by the company -- being moved to a much smaller office, having his building access restricted, and being ordered to turn in his employee badge and his gate opener to the executive

parking garage. By themselves, these incidents probably would merit only a small award of compensatory damages. But these small events were the precursor of more serious problems to come as Hobby experienced continuing difficulty finding work in his chosen profession, and experienced emotional distress tied to his depleted finances, repeated requests of friends and family for money, and the obligation to inform those responsible for his professional development that he had been fired from his job with Georgia Power. In terminating Hobby's employment because of his internal complaints, Georgia Power severely damaged Hobby's reputation. It is clear from the record that Hobby's career had been very promising up until his termination; afterward, that career was largely gone. In this context, we find the ALJ's recommended award of $250,000 compensatory damages to be reasonable, and therefore adopt it.

Slip op. at 35 (footnote omitted).

In *Smith v. Esicorp, Inc.*,1993-ERA-16 (ARB Aug. 27, 1998), the ALJ found the complainant to be a very credible witness in describing the impact of the respondent's harassment, and recommended an award of $100,000 in compensatory damages. The ARB faulted the ALJ, however, for not explaining how he arrived at the $100,000 figure, and noted that it is appropriate to consider the range of awards made in similar cases when awarding compensatory damages. The Board, therefore, listed recent Secretary and ARB decisions awarding compensatory damages for emotional distress for instruction:

> *Van der Meer v. Western Kentucky University*, ARB Case No. 97-078, ALJ Case No. 95-ERA-38, ARB Dec., Apr. 20, 1998. The ARB awarded Van der Meer $40,000 because he suffered public humiliation and the respondent made a statement to a local newspaper questioning Van der Meer's mental competence.
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> *Gaballa v. The Atlantic Group*, Case No. 94-ERA-9, Sec'y Dec., Jan 18, 1996, slip op. at 5. Gaballa had been blacklisted, and testified that he felt his career had been destroyed by the respondent's action. The Secretary reviewed the compensatory damages awards for mental and emotional suffering made in a number of cases, which ranged from $10,000 to $50,000, and awarded Gaballa $35,000.
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> *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, Dep'y Sec'y Dec., Feb. 14, 1996, slip op. at 25. The Deputy Secretary awarded Creekmore $40,000 for emotional pain and suffering caused by a discriminatory layoff. Creekmore showed that his layoff caused emotional turmoil and disruption of his family because he had to accept

temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company.

Michaud v. BSP Transport, Inc., ARB Case No. 97-113, ALJ Case No. 95-STA-29, ARB Dec. Oct. 9, 1997, slip op. at 9. The ARB awarded $75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist. Evidence also showed foreclosure on Michaud's home and loss of savings.

Smith v. Littenberg, Case No. 92-ERA-52, Sec'y Dec., Sept. 6, 1995, slip op. at 7. The Secretary affirmed the ALJ's recommendation of award of $10,000 for mental and emotional stress caused by discriminatory discharge where Smith supported his claim with evidence from a psychiatrist that he was "depressed, obsessing, ruminating and ha[d] post-traumatic problems."

Blackburn v. Metric Constructors, Inc., Case No.1986-ERA-4, Sec'y Dec. after Remand, Aug. 16, 1993, slip op. at 5. The Secretary awarded Blackburn $5,000 for mental pain and suffering caused by discriminatory discharge where Blackburn became moody and depressed and became short tempered with his wife and children.

Bigham v. Guaranteed Overnight Delivery, Case No. 95-STA-37, ARB Case No. 96-108, ARB Dec., Sept. 5, 1997, slip op. at 3. The ARB awarded Bigham $20,000 for mental anguish resulting from discriminatory layoff.

Lederhaus v. Paschen, Case No. 91-ERA-13, Sec'y Dec., Oct. 26, 1992, slip op. at 10. The Secretary awarded Lederhaus $10,000 for mental distress caused by discriminatory discharge where Lederhaus showed he was unemployed for five and one half months; foreclosure proceedings were initiated on his house; bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted.

The ARB noted that a complainant must prove the existence and magnitude of subjective injuries with competent evidence. In addition, the ARB held that "[t]he severity of the retaliation suffered by [Complainant] is also relevant to our determination of appropriate compensatory damages. The courts have held that the more inherently humiliating and degrading the defendant's action, the more reasonable it is to infer that a person would suffer emotional distress, and the more conclusory the evidence of emotional distress may be." *Smith*,1993-ERA-16 at 4.

Based on these principles and comparisons, the ARB reduced the compensatory damages award to $20,000 for mental pain and suffering, finding that respondent's conduct was limited to several cartoons lampooning the complainant for his protected activities, that the complainant did not suffer loss of a job or blacklisting and did not incur financial losses, and that the complainant's evidence of mental and emotional injury was limited to his own testimony and that of his wife. *Hobby, supra*.

I thus find the Complainant's request for $50,000 in compensatory damages comparatively reasonable. She was out of work between the time she was fired and the last date of the hearing. Her mental anguish, anxiety and post-traumatic stress disorder were not only apparent at the hearing, but well-documented by Drs. Sitarik, Spahija and Walker, as well as the lay testimony of her friend and neighbor, Ms. Woodford, and former co-worker, Mr. Lancaster. She was not interviewed or hired at HES when she sought to leave VRA. Like the complainant in *Hobby*, Ms. Trueblood's career aspirations have been thrown into turmoil by the actions of the respondents. Ms. Knowles testimony that other employees cheered about her discharge is particularly illustrative of the impact the entire range of actions by the Respondents has had on her reputation. I have considered the range of compensatory damages in other cases, which ranges from $4,000 to over $250,000. Thus, I find Ms. Trueblood entitled to $50,000 in compensatory damages.

CONCLUSIONS

In conclusion, while VRA avers it has allowed its employees to freely speak with the OEPA inspectors stationed at its East Liverpool facility, its informal policy under which employees are to first report environmental compliance issues to management or their supervisors is unlawful. VRA, by and through Mr. Fred Sigg and Dr. Rudolph Zaengerle took adverse personnel action against the complainant, Ms. Donna Trueblood, after she had communicated with the US EPA and the Ohio EPA, because of her non-adherence to the unlawful policy. Ms. Trueblood was subsequently inappropriately placed under greater scrutiny by her supervisors and management and subjected to a hostile work environment at VRA. While some believed Ms.

Trueblood may not have been the ideal co-worker and may have broken some of VRA's rules, the nature of the disciplinary action taken against her was motivated in large measure by VRA's retaliatory intent for her whistleblowing activities. VRA, brick-by-brick, built a record upon which to eventually base her unlawful termination. She was denied the opportunity to interview for an HES position and a hiring freeze was temporarily imposed as a ruse due to the involvement of Dr. Zaengerle, who served as the President of VRA and HES. She was terminated on October 25, 2002. As a direct result of VRA's and HES' actions, Ms. Trueblood has greatly suffered. She is awarded $50,000.00 in compensatory damages and $125,000.00 in exemplary damages to be paid by the Respondents. Her reasonable attorney fees, costs, and expenses will be paid by the Respondents.

ORDER

WHEREFORE, IT IS ORDERED THAT the Respondents shall pay and the Complainant is entitled to the following relief:

1. Immediate reinstatement, if she desires, at VRA as a service technician with the drum crew and restoration of all benefits, terms and privileges of employment.

2. VRA shall reinstate her leave time used between March 13 and May 6, 2002, on the deposition dates (August 5, 6, 7, 19, 28, 30, and Sept. 3, 2002) and for the first eight days of the hearing, or reimburse her for the same.

3. VRA shall pay back pay and back benefits (October 25 until reinstated), reinstatement of seniority and tenure. VRA shall pay interest on such back pay and benefits.

4. VRA shall expunge her disciplinary record or record of adverse personnel actions for the period of March 1, 2002 through and including October 25, 2002, and any references thereto.

5. The Respondents are prohibited from disclosing any disparaging information about her to prospective employers or otherwise interfering with any applications she may make. Thus, if she no longer works for them, they may only related that she had and no longer does.

6. Respondents shall pay $50,000.00 compensatory damages; $45,000.00, to be paid by VRA and $5,000.00 by HES.

7. Respondents shall pay exemplary damages, under TSCA and SDWA, in the amount of $125,000.00; to be paid $115,000.00 by VRA and $10,000.00 by HES.

8. Payment of reasonable attorney's fees, costs and expenses of the complainant, upon submission of a properly substantiated fee petition subject to the reasonable objections of the opposing parties. 90% of the amount shall be paid by VRA and 10% by HES.

9. A copy of this Recommended Decision and Order shall be made available in a prominent manner at all of Respondents' facilities, in the United States, within seven calendar days of the date of the decision.

10. Both Respondents shall prominently post notices (in at least 12-point font with a bold heading) at all their facilities, in the United States, which state:

NOTICE TO EMPLOYEES OF WHISTLEBLOWER PROTECTIONS

There is no requirement for employees who wish to or do contact federal agencies, such as Environmental Protection Agencies, with their concerns over environmental compliance matters to first report such matters to either a supervisor or to management. Any policy stating or suggesting otherwise is unlawful. Your reports to agencies are not the concern of management or your supervisors. Von Roll America and Heritage Environmental Services, LLC, were recently ordered to pay $50,000 in compensatory damages, punitive damages in the amount of $125,000, and reasonable attorney fees and costs, in a case, arising at their East Liverpool facilities, where VRA had attempted to enforce such an unlawful policy. HES colluded with VRA in not considering the aggrieved employee for a position with it. Should you perceive your employer is interfering or has interfered with your communications to environmental agencies, you may file a federal whistleblower complaint against them with the Occupational Safety & Health Agency ("OSHA").

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RICHARD A. MORGAN

Administration Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.